

**“I smooth’d him up with fair words”:
Intersocietal Law, from Fur Trade to Treaty**

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Abstract

History is an essential part of aboriginal law. The two disciplines, however, may produce incompatible narratives of indigenous-settler relations. In addition, indigenous legal traditions and the fur trade in the old North West have been under-represented in Canadian legal history, a gap that demotes over two centuries of working relationships to a brief preface to the numbered treaties and confederation. This dissertation seeks to bring under-observed normative relations between indigenous and European traders into Canadian legal history. It further considers the relevance of fur trade law to the jurisprudence on aboriginal treaty rights and the significance of history in overcoming historical injustice in settler states.

Using an ethnohistorical methodology, three case studies are presented on the law of the fur trade followed by a chapter connecting the interpretation of the intersocietal law of the fur trade to the interpretation of treaties in history and law. Focussing the fur trade as conducted by the Hudson's Bay Company and the North West Company, the case studies investigate the normative expectations of the indigenous and company traders around particular aspects of the trading relationship. These aspects include institutions of leadership, the formation and maintenance of friendships, negotiations of trading post location, and the exchange of provisions and support in times of famine and illness.

In these case studies, the intersocietal law of the trade is interpreted as incomplete and often laden with misunderstanding. It involved competition between normative systems and harboured persistent disagreements, even while sufficient shared obligations and occasional shared meanings emerged to support robust working relationships. This interpretation of the intersocietal law of the fur trade demands a shift in the characterization of treaties in history and law. I argue that to better serve the aims of justice and reconciliation, both the classification of treaties in history and the interpretive focus of the treaty rights jurisprudence must change to allow the complexity of the historical relationship – including the disagreements and injustices buried in simpler narratives – to emerge.

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Chapter 1: Introduction

History is an essential part of aboriginal law. In Canadian jurisprudence, aboriginal rights are premised on historical rights and relationships. Any attempt to establish an aboriginal right demands a thorough understanding of the long and varied history of indigenous-settler relations in North America. What emerges in legal argument, however, is a historical analysis that selectively pulls what is necessary to support the aboriginal rights doctrines without undermining the legitimacy of the authority of the state.

There are many different versions of legal and philosophical reasoning that cull from the resources of history and they do so differently. Philosophies and legal arguments built on liberalism, for example, tend to view history as having produced injustices and distributive problems that need to be addressed in the present. For liberals, aboriginal rights are a modern phenomenon that have a role to play in redressing the conditions produced by history and in supporting indigenous peoples to thrive in liberal democracies.¹ In these approaches, history is something to be overcome. By contrast, communitarian philosophies and related critiques of liberalism emphasize the situatedness of individuals in traditions and community, giving history a constructive force in the

¹ See, e.g., Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Burke A. Hendrix, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (Pennsylvania State University Press, 2008).

present.² Similarly, common law reasoning draws on history through precedent, looking for continuity with the past while adapting historical resources to the present.³ And the presence of the past in the common law also finds parallels in some aspects of indigenous oral history and legal traditions.⁴ Authors who draw on these traditions view aboriginal rights as deriving from ancient rights, arguing that respect for historical aboriginal rights is essential to creating conditions of justice and legitimate state power.⁵ In these approaches, history and historical patterns of interaction are generative of a rule of law that can and must be carried forward into the present.

History is thus premise, content, justification, and source of aboriginal rights. But regardless of philosophical orientation, the retrospectivity of legal analysis means that history is filtered through legal and moral reasoning. In general, lawyers start from law and present-day legal problems and work backwards into history, rather than starting

² See, e.g., Alisdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd Edition (Duckworth, 1993); James Tully, *Strange Multiplicity. Constitutionalism In An Age of Diversity* (Cambridge: Cambridge University Press, 1995); Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).

³ See, e.g., Martin Krygier, "Law as Tradition" (1986) 5 *Law and Philosophy* 237; Gerald J. Postema, "On the Moral Presence of Our Past" (1990-91) 36:4 *McGill Law Journal* 153; Brian Simpson, "The Common Law and Legal Theory" in *Legal Theory and Legal History: Essays on the Common Law* (London: The Hambledon Press, 1987) 359.

⁴ See, e.g., John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows 2010]; Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in J. Webber and C. M. Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45; Bruce Granville Miller, *Oral History on Trial. Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).

⁵ See, e.g., Borrows 2010, *ibid.*; Kent McNeil, *Emerging Justice? : Essays on Indigenous Rights in Canada and Australia* (Saskatoon : Native Law Centre, University of Saskatchewan, 2001); Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 *McGill L. J.* 711; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Cdn. Bar Rev.* 196 [Slattery, "Making Sense"].

from history and working back out to law. Historical inquiry serves legal argument more often than it inspires. In this dissertation, I attempt to work between the disciplines in both directions. Initially inspired by debates about the sources of aboriginal rights and Crown sovereignty, and the complexities of continuing colonial dynamics in indigenous-state relations in the present, I wanted to understand the historical experience reflected in (and distorted by) both contexts. Chapters two to four, in which I present case studies of indigenous-settler relations during the fur trade, pursue the historical experience without attempting legal argument. Through these studies, however, it became apparent that the material was much more relevant to law and legal argument than anticipated. As a result, in the final chapter, I return to the lawyer's tradition of relying on history to support normative argument in a manner that – I hope – brings some historical subtlety back to the law.

1. The Backdrop: Literatures and Debates

The chapters that follow are unified by their inspiration from and reflection on the notion of intersocietal law. It is a notion that has many parallels and connections to accounts of legal pluralism and the agency of indigenous peoples in colonial history. More than two decades of scholarship on indigenous history and indigenous-settler interactions in North America, in which histories of the “victor” made way for more attention indigenous motivations and forms of resistance, led the way for more attention

to law in the interactions.⁶ Studies of colonial legal history, particularly ones that take their lead from the practices of colonial and local actors over statements of law and policy from the imperial metropole, illustrate these directions and have recognized the persistence of local and indigenous legal cultures through the colonization, at least before the mid-nineteenth-century.⁷ Similarly, geographically focused studies of the fur trade in North America have described diplomatic protocols of exchange that drew from indigenous traditions as much or more than from European ones, and revealed worlds in which sophisticated inter-cultural negotiators thrived.⁸ Still more parallel developments can be found in the fields of anthropology and legal pluralism, which have made cultural

⁶ See, e.g., Daniel K. Richter, "Whose Indian History?" (1993) 50 *The William and Mary Quarterly* 379 [Richter (1993)]; Daniel K Richter, *Facing East from Indian Country. A Native History of Early America* (Cambridge, Mass: Harvard University Press, 2001); James Axtell, *Natives and Newcomers: The Cultural Origins of North America* (New York: Oxford University Press, 2001); James H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: W.W. Norton & Co., 1999). In the Canadian context, see Germaine Warkentin & Carolyn Podruchny, eds., *Decentring the Renaissance: Canada and Europe in Multidisciplinary Perspective, 1500-1700* (Toronto: University of Toronto Press, 2001) and John S. Lutz, *Makúk. A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008)

⁷ See, e.g., Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010); Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002) and Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010).

⁸ See, e.g., Jennifer Brown, *Strangers in Blood. Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); Bruce M White, "The Woman Who Married a Beaver: Trade Patterns and Gender Roles in Ojibwa Fur Trade" (1999) 46:1 *Ethnohistory* 109 [B. White, "Married a Beaver"]; Richard White, *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Regions, 1650 - 1815* (Cambridge: Cambridge University Press, 1991); Carolyn Podruchny and Laura Peers, eds, *Gathering Places: Aboriginal and Fur Trade Histories* (Vancouver: UBC Press, 2010) [Podruchny & Peers 2010].

and legal mixing a subject of study in its own right, with increasing attention to the agency of individuals within the encounters of collectives and cultures.⁹

These developments share important observations around how the power of the colonizer does not dictate everything about the outcome of colonization; that despite grand narratives and themes of colonial history found world-wide, significant differences in relationships and structures can be found by taking a contextualized approach. Contextualized colonial histories also demonstrate that power in the colonial relationship was not immediately the colonizer's to exercise; that long periods of interaction often conditioned and may have been necessary to consolidate colonial power. Such observations have found their way into legal discourse and doctrinal discussions, but incompletely.

Within legal discourse, recognition of local and indigenous traditions has always been a part of the Imperial legal doctrines guiding the reception of English law in British

⁹ From anthropology, see e.g., Sally Engle Merry, "Anthropology, Law, and Transnational Processes" (1992) 21 *Annual Review of Anthropology* 357 and Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton: Princeton University Press, 1999). Between law and anthropology, see e.g., Susan G. Drummond, *Mapping Marriage Law in Spanish Gitano communities* (Vancouver: UBC Press, 2006). From law, see e.g., Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 *Osgoode Hall Law Journal* 167; Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 *Canadian Journal of Law & Society* 25. Although not focused on the agency of individuals, Nicole Roughan's attention to the form of association between legal orders is worth mentioning here because it also attends to power dynamics in pluralist interactions: Nicole Roughan, "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 *University of Toronto L. J.* 135.

colonies, as illustrated in Canada in *Connelly v Woolrich*.¹⁰ However, these doctrines, along with most jurisprudence and theories of aboriginal rights, emphasize the separation and distinctiveness between the British and indigenous legal regimes, rather than the blending, adaptation and interaction between legal regimes emphasized in the historical and anthropological interpretations referenced above. Doctrinal discussions of aboriginal and treaty rights – and particularly the latter – might recount a period of recognition in which indigenous peoples were important allies.¹¹ More recently, the Supreme Court hinted at the complex processes involved in the acquisition of sovereignty by noting a difference between *de jure* and *de facto* sovereignty in its articulation of the constitutional duty to consult.¹² The *Tsilhqot'in Nation* decision from the BC Court of Appeal also makes space for such discussions by noting that it is “curious that a treaty [the Oregon Treaty of 1846] that had no practical impact on relations between the Crown and the Tsilhqot'in can be seen as the defining moment” for determining the acquisition of sovereignty against the Tsilhqot'in and thus the timeline for establishing

¹⁰ (1867), 17 RJRQ 75, aff'd *Johnstone v Connolly*, (1869) 17 RJRQ 266. See also *Campbell v Hall* (1774), 1 Cowp 204, 98 ER 1045 (KB) and *Amodo Tijani v Southern Nigeria (Secretary)*, [1921] 2 AC 399.

¹¹ See, e.g. *R v Sioui*, [1990] 1 SCR 1025.

¹² *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 32 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 42. For discussion, see Mark D. Walters, “The Morality of Aboriginal Law” (2006) 31 Queen's LJ 470; Kent McNeil, “The Meaning of Sovereignty”, draft chapter (on file with author); Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).

their aboriginal title.¹³ However, beyond the academic literature, these discussions have not (yet) amounted to a fundamental restructuring of the theory of the origins and nature of state authority in Canada at law. Standard accounts of constitutional history and the authority of the state remain, perhaps unsurprisingly, committed to the univocal Imperial theory and unable to grapple with ideas of law and constitutional relationships with indigenous peoples that developed through patterns of interaction and rely in part on indigenous legal traditions.¹⁴

Legal scholars working from common law and indigenous perspectives have much in common with the tide of transnational colonial histories and detailed, contextual analysis of legal pluralisms found in academe. These scholars theorize aboriginal and treaty rights in a manner that takes historical patterns of interaction into account, and thus recognize indigenous peoples' actions and legal traditions as a source of such rights. Treaty federalism or constitutionalism is one strand of theorizing that relies on the interaction of indigenous and settler legal systems as captured and memorialized in treaties.¹⁵ While treaties may be interpreted as maintaining the separateness and

¹³ *William v British Columbia*, 2012 BCCA 285 at para 32. See also the discussion in the trial decision, *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 585-602

¹⁴ See, for e.g., Peter W Hogg, *Constitutional Law of Canada*, 2012 Student ed. (Toronto: Carswell, 2012) at 2-1 and 2-2 (noting the complexity of the survival of aboriginal law but putting it to the side) and John Borrows' critique of Professor Hogg's presentation in Borrows 2010, *supra* note 4 at 13-15. See also Peter Fitzpatrick, *Modernism and the Ground of Law* (Cambridge: Cambridge University Press, 2001) at 175.

¹⁵ See, e.g., James [sa'ke'j] Youngblood Henderson, "Empowering treaty federalism" (1994) 58 Sask. L. Rev. 241, James [sa'ke'j] Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007); Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in Francois Rocher & Miriam Smith, eds., *New Trends in Canadian Federalism*, 2d ed

distinctiveness of the legal worlds of the participants,¹⁶ even such treaties have been recognized as generative of normative ordering and common interpretive space.¹⁷

Another and related strand focusses more on intersocietal law than treaties, capturing a broader set of historical experiences that may include treaties as well as less formally negotiated terms of co-existence and the development of customary rules. Authors have also identified intersocietal law as a source of aboriginal rights, but there are subtle differences in how the significance of intersocietal law is understood.¹⁸ No one looks towards intersocietal law for particular rules that crystallized at a given moment (apart from treaties) and that could or should be brought to a court today to enforce. Instead, intersocietal law is characterized as an important source and foundation of aboriginal rights, leaving the particular shape and contributions of this body of law vague and obscure on most accounts. Brian Slattery has addressed the relationship between the historical processes of interaction and legal doctrine most extensively (and indeed coined

(Peterborough, Ont: Broadview Press, 2003) 181; and Tully, *supra* note 2. These theories are discussed in greater detail in Chapter 5.

¹⁶ See, e.g., Haudenauonee and interpretations of two row wampum: Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 Univ. of Toronto Faculty of Law Rev. 1; Paul Williams, *The Chain* (LLM Thesis, Osgoode Hall Law School, York University Law, 1982) [unpublished].

¹⁷ See, e.g., Robert A. Williams Jr., *Linking Arms Together. American Indian Treaty Visions of Law and Peace, 1600-1800* (New York; Oxford: Oxford University Press, 1997); Mark D. Walters, "Brightening the Covenant Chain. Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24:2 Dalhousie Law J. 75.

¹⁸ See, e.g., Borrows 2010, *ibid*; Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L. J. 101 [Slattery, "Organic"]; Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L. J. 623 [Webber, "Relations of Force"]; Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L. J. 470 [Walters, "Morality"].

the term “intersocietal law”¹⁹). He has described the lengthy process of interaction between indigenous peoples and European traders and settlers as foundational to the Canadian federation and continues to identify the intersocietal law that emerged from this interaction as the principle historical source of the doctrine of aboriginal rights.²⁰ Jeremy Webber has taken a similar approach, but added processes of reflection to the “intercommunal norms” that emerged from the historical interactions in describing how historical intersocietal law has contributed to aboriginal rights. He thus describes aboriginal rights as “the product of practical reason — a process of experimentation and reflection that begins from a concrete reality of a lived relationship, tries to understand its strengths and weaknesses, and derives from it workable conceptions of justice.”²¹ For these authors, the interaction captured by the notion of intersocietal law was embedded within the common law and British colonial policy, which adapted and responded to the experience of colonization as it evolved. More recent engagements with the notion of intersocietal law, represented by John Borrows and Mark Walters, focus on the contemporary context to argue that a morally justifiable account of aboriginal rights will

¹⁹ Which he initially referred to “intersocietal custom”; see Slattery, “Making Sense”, *supra* note 5.

²⁰ Slattery, “Organic”, *supra* note 18 and Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Supreme Court Law Review 595 [Slattery, “Generative”].

²¹ Webber, “Relations of Force”, *supra* note 18 at 630, 638. For similar discussions of Aboriginal law as deriving from both indigenous and European legal traditions, see John Borrows, “With or Without You: First Nations Law in Canada” in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) chptr 3; Walters, “Morality”, *supra* note 18.

be intersocietal in character, and thus the content of aboriginal rights will be constituted by both indigenous and common law principles.²²

These discussions from law, history and anthropology form the starting points for this dissertation. Taking my lead from the legal writers working from common law and indigenous law traditions in particular, I have attempted to bring a critical view to the notion of “intersocietal” law. In the legal theorists’ work, intersocietal law is both descriptive and prescriptive. It is an attractive notion – that very different peoples find modes of co-existence that organically and through iterative processes of negotiation give rise to workable norms that structure their relationship.²³ It also takes the historical interpretations of indigenous agency and mediated assertions and acquisitions of power and absorbs them into legal doctrine. But what exactly is the stuff of intersocietal law? And how has it come to inform or be represented within aboriginal rights doctrines?

Jeremy Webber explored two examples of the *modus vivendi* through intercommunal murder and recognition of aboriginal land rights, demonstrating that at least the latter informed judicial interpretation in the nineteenth-century and was thus absorbed into common law aboriginal rights doctrines.²⁴ While admirably and convincingly making the connections in relation to the nineteenth-century jurisprudence, Webber’s (as well as Slattery’s) historical investigations leave much room for further

²² Borrows 2010, *supra* note 4 and Walters, *ibid*.

²³ Parallels to the modes of formation of international law are notable.

²⁴ See also Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of their Territories* (D. Phil. Thesis, Oxford University, 1979) [unpublished].

investigation and critical reflection. First, these accounts are focused on seventeenth- and eighteenth-century colonial North America, an experience with specific geographical and cultural content. While Marshall CJ ‘reflected’ on this colonial experience in the early nineteenth-century Cherokee trilogy, pronouncing the common law principles by which indigenous tribes maintained their land rights and sovereignty but in a diminished form,²⁵ interactions between European and indigenous settlers had just begun in large expanses of the pre-Canadian northwest. Does Marshall CJ’s synthesis of early North American colonialism also reflect the experience in Rupert’s Land and the North Western Territory (where settler-colonialism was slow to arrive and replace the fur trade as the dominant mode of interaction, and in some northern locales, arguably has yet to fully arrive)? Second, existing accounts leave many questions about the dynamics and content of intersocietal law: How does the content of intersocietal law reflect the sources of the two (or more) legal systems that went into the mix? How does the development of intersocietal norms impact the contributing systems? Is it transformative? Do participant groups adapt and grow closer together, or can intersocietal law support or even reinscribe maintaining large differences? Moving the geography of intersocietal law north and west, these questions are particularly relevant if we are going to understand the processes of intersocietal law as something other than an aspect of Métis ethnogenesis.²⁶

²⁵ *Johnson v M’Intosh*, 21 U.S. 543, 8 Wheat. 543 (1823); *Cherokee Nation v Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v Georgia*, 31 U.S. (6 Pet.) 515 (1832).

²⁶ As will become apparent in the chapters that follow, this dissertation does not address the ethnogenesis of the Métis. For literature about Métis (or métis) ethnogenesis, see Jacqueline Peterson and Jennifer Brown,

Further, regardless of geography and the drive to further articulate the dynamics of intersocietal law, the doctrine of aboriginal rights has undergone much development and transition since Slattery and Webber first wrote about the contributions of intersocietal law. Both McNeil and Walters have noted that the Supreme Court has taken a turn away from the old common law doctrines that, in some explanations, embodied or absorbed the long indigenous-settler interaction that preceded and enabled the establishment of *de facto* Crown sovereignty.²⁷ Any continuity of modern aboriginal rights with the norms that emerged from historic relationships and patterns of co-existence are consequently less important doctrinally.²⁸ In addition, much critical scholarship, often by indigenous writers, rejects the proposition that the aboriginal rights doctrines (at least as they have been as developed under s 35) are capable of

The New Peoples: Being and Becoming Métis in North America (Winnipeg: University of Manitoba Press, 1985); Heather Devine, *The People Who Own Themselves. Aboriginal Ethnogenesis in a Canadian Family, 1660-1900* (Calgary: University of Calgary Press, 2004); Jean Barman and Mike Evans, "Reflections on Being and Becoming Métis in British Columbia" (Spring 2009) BC Studies 59; Chris Anderson, "Moya 'Tipimsook ('The People Who Aren't Their Own Bosses'): Racialization and the Misrecognition of 'Métis' in Upper Great Lakes Ethnohistory" (2011) 58 Ethnohistory 37.

²⁷ Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill L. J. 711 and Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?" (2007) 37 Supreme Court Law Review (2d) 177.

²⁸ Brian Slattery's more recent work also reflects these shifts in the doctrine. His reliance on intersocietal law has shifted from the primary source of aboriginal rights (see "Making Sense", *supra* note 5) to the primary source of the historical aspect of aboriginal law that is combined with a contemporary dimension governed by principles of reconciliation (see "Generative", *supra* note 20). Thus, the historical dimension of intersocietal law gave rise to historical rights from which modern rights can be worked out, guided by principles that also require indigenous input but in the context of a contemporary constitutional balancing exercise. With respect to aboriginal title specifically, Slattery emphasizes the importance of negotiations to define the modern rights; "The Metamorphosis of Aboriginal Title" (2007) 85 Canadian Bar Review 255.

accommodating indigenous law and perspectives.²⁹ The debate has thus shifted from the sources of aboriginal rights to defining an approach that supports “reconciliation,” which the Supreme Court has called the “grand purpose” of s 35. Reconciliation has received various articulations in the Supreme Court,³⁰ which include working out “a mutually respectful long-term relationship”³¹ in addition to, instead of, or as an expected consequence of “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”³² Where does that leave intersocietal law? Are the historical sources of aboriginal rights less important to the modern construction of aboriginal rights than before? Why and how should historical processes of governing relationships be prescriptive of contemporary constitutional rights? Or has intersocietal law acquired a new importance in the post-1982 jurisprudence, in light of the Court’s acknowledgement of the difference between *de facto* and *de jure* sovereignty and the resulting need to

²⁹ See, e.g., Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor Yearbook of Access to Justice 17 and Minnawaanagogiizhigook (Dawnis Kennedy), “Reconciliation without Respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77. Another branch of criticism attacks the continuity principle upon which common law aboriginal rights are founded, whether reflecting intersocietal law or not. These critiques argue that the recognition of aboriginal societies and legal systems of the eighteenth century did not carry through the nineteenth century, during which aboriginal rights were a matter of politics and not law and thus justiciable aboriginal rights are a thoroughly modern doctrine; see e.g., Paul G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004).

³⁰ See Dwight G. Newman, “Reconciliation. Legal Conception(s) and Faces of Justice” in John D. Whyte, ed., *Moving Toward Justice. Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing Ltd & Saskatchewan Institute of Public Policy, 2008) 80.

³¹ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

³² *R v Van der Peet*, [1996] 2 SCR 507 at para 31.

understand the processes by which sovereignty was acquired (or continues to be) and/or the processes that might support a just expression of sovereignty by the Canadian state?

2. The Content: Overview and Methodologies

This dissertation presents my attempt to engage with the issues and questions outlined above. Drawn more to probing the historical nature of intersocietal law than engaging directly with theorizing about aboriginal rights, I began to examine the nature and applications of intersocietal law. As I progressed through the case studies, I began to understand the value of these explorations more in terms of their offerings and indirect reflections in relation to the processes of co-existence and sovereignty than as a means to directly answer any of the questions posed above. In other words, the value of these studies is in the narratives of the shape and dynamics of legal ordering in intersocietal spaces, rather than (or more than) in any particular prescriptive direction for aboriginal rights or as an evidential base to respond to the sources and nature of aboriginal rights in a particular geography. In the end, however, I could not avoid the prescriptive call of legal training to take up the challenge of working through what my interpretation of a long history of interaction between indigenous and European traders and settlers – an organic foundation for Canadian constitutionalism – demands of the law.

Chapters two through four present case studies of intersocietal law in the context of the fur trade, the primary arena for studying indigenous-settler relations in the under-

represented northwest region. Chapter two ranges across different periods, geographies, and peoples, from York Factory to the prairies. Chapter three stays in the York Factory area and early period of the Hudson's Bay Company's presence there through to the mid-eighteenth century. And chapter four focuses on the MacKenzie River District, Fort Good Hope in particular, spanning both the North West and Hudson's Bay Company's activities there in the early nineteenth century. Each chapter was written for particular conferences and publication projects, and so reflects both the themes of this dissertation as well as something of each project's aims and contexts as well. Together, these chapters focus on key features of fur trade exchange as suggested by my limited review of materials from the Hudson's Bay Company archives, published historical documents, ethnographic materials and oral histories, and the secondary literature.³³ These features or institutions are: leadership (chapter two), exchange of food (chapter three), and access to land and resources (chapter four). Notably absent as foci are features of the fur trade that have been well developed in the historical literature: fur trade marriages,³⁴ and the

³³ Please refer to Appendix A for the design of the studies and the scope of the primary research.

³⁴ See the seminal works: Silvia Van Kirk, "*Many Tender Ties.*" *Women in Fur-Trade Society in Western Canada, 1670 -1870* (Winnipeg: Watson & Dwyer Publishing Ltd., 1980) and Jennifer Brown, *supra* note 8. See also more recent contributions: Jennifer Brown, "Partial Truths. A Closer Look at Fur Trade Marriage" in Theodore Binnema, Gerhard J. Ens & R.C. Macleod, eds., *Rupert's Land to Canada. Essays in Honour of John. E. Foster* (Edmonton: University of Alberta Press, 2001) 59; Heather Rollanson Driscoll, "'A Most Important Chain of Connection.' Marriage in the Hudson's Bay Company" in Theodore Binnema, Gerhard J. Ens & R.C.Macleod, eds., *ibid.* 81; Bruce White, "Married A Beaver", *supra* note 8; Susan Sleeper-Smith, *Indian Women and French Men: Rethinking Cultural Encounter in the Western Great Lakes* (Amherst: University of Massachusetts Press, 2001); Susan Sleeper-Smith, *Rethinking the Fur Trade: Cultures of Exchange in an Atlantic World* (Lincoln, Nebraska: University of Nebraska Press, 2009), Part 5.

exchange of furs for trade goods that was the lifeblood of the whole endeavour.³⁵ Also absent are focii on international or intersocietal homicide³⁶ and disciplinary practices within the forts and in relation to trading company employees³⁷ – the aspects of fur trade relations that have received attention within specifically legal histories of the fur trade.

These absences are partially intentional and partially a result of the limited scope of archival research. In light of the methodological lessons of my Masters' thesis, this

³⁵ See Arthur J. Ray & Don Freeman, 'Give Us Good Measure': An Economic Analysis of Relations Between the Indians and the Hudson's Bay Company Before 1763 (Toronto: University of Toronto Press, 1978); Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974); Daniel Francis & Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600-1870* (Montreal and Kingston: McGill-Queen's University Press, 1983); Abraham Rotstein, "Trade and Politics: An Institutional Approach" (1972) 3 *Western Cdn. J. of Anthropology* 1; Peter Cook, "Symbolic and Material Exchange in Intercultural Diplomacy: The French and the Haudenosaunee in the Early Eighteenth Century" in Jo-Anne Fiske, Susan Sleeper-Smith & William Wicken, eds., *New Faces of the Fur Trade. Selected Papers of the Seventh North American Fur Trade Conference, Halifax, Nova Scotia* (East Lansing: Michigan State University, 1995) 75; Michael Payne, "Fur Trade Historiography" in Theodore Binnema, Gerhard J. Ens & R.C. Macleod, eds., *Rupert's Land to Canada. Essays in Honour of John E. Foster* (Edmonton: The University of Alberta Press, 2001) 3.

³⁶ See Hamar Foster, "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds., *Essays in the History of Canadian Law*, vol 5 (Toronto: Osgoode Society for Canadian Legal History, 1994) 41; Hamar Foster, "Conflict Resolution During the Fur Trade in the Canadian North West, 1803-1859" (1993) 51 *The Advocate* 871; John Phillip Reid, *Patterns of Vengeance: Crosscultural Homicide in the North American Fur Trade* (Pasadena, Calif.: Ninth Judicial Circuit Historical Society, 1999). See also Webber, "Relations of Force", *supra* note 18 at 638; and, John A. Dickinson, "Native Sovereignty and French Justice in Early Canada" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds., *ibid.*, vol. 5, 17 (although Dickinson's consideration of this issue is set in New France, in the context of French-Algonquian political alliances rather than 'only' the fur trade).

³⁷ See Hamar Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie River Murders, 1835-1839" (1989) 10 *Criminal Justice History* 23 (a story of one application of Canadian jurisdiction into fur trade country to prosecute a mixed-blood company employee for murder); Russell Smandych & Rick Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 *Cdn. J. of L. & Soc'y* 21. See also Robert Baker, *Law Transplanted, Justice Invented: Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670-1870* (Master's Thesis, University of Manitoba, 1996) [unpublished], chapter 3; Paul C. Nigol, *Discipline, Discretion and Control: The Private Justice System of the Hudson's Bay Company in Rupert's Land, 1670-1770* (PhD Thesis, University of Calgary, 2001) [unpublished], esp chptr 3; and Edward Cavanagh, "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670-1763" (2011) 26 *Can. J of L. & Soc'y* 25 [Cavangah].

project had no pretensions to achieving a broad survey of the law of the fur trade. However, I still had hopes of exploring law in the day-to-day interactions, processes, and obligations rather than in the exceptional moments, such as homicide and fur trade marriages. I was looking for norms of conduct and relationship rather than ceremony. As a lawyer, of course, I should have known better: ceremony and exceptional events illuminate the ordinary through the symbols, relations, and principles that are applied in those moments of performance and crisis. But I was also interested in shifting the subjects of study away from a few well-known examples of fur trade laws (paying compensation for homicides and custom of the country marriages) and the annual or bi-annual ceremonies of trade, if the materials suggested that this re-direction was appropriate and possible. In the end, the foci and absences are more a result of the scope of the archival research than these initial intentions, and these well-known features of the fur trade and of fur trade law make appearances and remain important in my interpretations.

The content and methodology of these chapters look more like fur trade history – and ethnohistory in particular – than traditional legal history. These chapters use historical records, recorded stories, ethnohistorical material and other secondary literature to investigate particular symbols and words such as trading captains' coats, greetings of "I am hungry", dances to greet strangers and cement relationships, promises of sustenance, and statements of what would be just in the circumstances. This interpretive approach is similar to the methodologies of fur trade ethnohistorians, such as Jennifer

Brown³⁸, Carolyn Podruchny³⁹, Bruce White⁴⁰, and others, who attempt to achieve greater insight into the historical participants in the fur trade who did not create the written record, including women, indigenous people, and voyageurs. Relying on ethnographic and diverse materials, even if such materials are more recently created than the historical moment under investigation, allows ethnohistorians to “pose questions about earlier events and patterns, to investigate what is said, and often more important, what is not said in earlier historical documents.”⁴¹ While such methods have been critiqued as potentially introducing assumptions of cultural continuity⁴², other historians have argued that ethnohistorical methods are simply good history: the use of diverse materials to “read skeptically; question sources; verify assertions, understand the assumptions of the past and those of your generation and class, and even then, remember that all historical writing is interpretive rather than objective.”⁴³ Notwithstanding such debates, ethnohistorical methods appear to be the only option available to address the

³⁸ Jennifer Brown, *supra* notes 8 and 34. See also, Jennifer Brown “Ethnohistorians: Strange Bedfellows, Kindred Spirits” (1991) 38 *Ethnohistory* 113 and Jennifer Brown, “Rupert’s Land, *Nituskeenan*, Our Land: Cree and English Naming and Claiming around the Dirty Sea” in Ted Binnema & Susan Neylan, eds, *New Histories for Old: Changing Perspectives on Canada’s Native Pasts* (Vancouver: UBC Press, 2007) 18.

³⁹ See, e.g., Carolyn Podruchny, *Making the Voyageur World: Travelers and Traders in the North American Fur Trade* (Lincoln: University of Nebraska Press, 2006) and Carolyn Podruchny, Frederic W Gleach & Roger Roulette, “Putting Up Poles: Power, Navigation, and Cultural Mixing in the Fur Trade” in Peers & Podruchny 2010, *supra* note 8, 25.

⁴⁰ B. White, “Married a Beaver”, *supra* note 8 and Bruce M. White, “‘Give Us a Little Milk’: The Social and Cultural Meaning of Gift Giving in the Lake Superior Fur Trade” (1982) 48 *Minnesota History* 60.

⁴¹ B. White, “Married a Beaver”, *ibid.* at 117.

⁴² See, e.g., Richard White, *supra* note 8 at xiv. For a discussion of the risks involved in ethnohistorical methods, see also Inga Clendinnen, *Ambivalent Conquests: Maya and Spaniard in Yucatan, 1517-1570*, 2d ed.(Cambridge: Cambridge University Press, 2003 [1987]) at 133.

⁴³ Richter (1993), *supra* note 6 at 386.

subject matter at hand – norms constituted and guiding conduct across different cultures in a historical period with a minimal written record created by only a few of the European participants. Mark Walters has reached a similar conclusion in a study exploring an intercultural history of the imperial Crown: “The interpretation of the history of relationships between peoples in colonial settings, including their legal relationships, must involve the distinctive methods associated with *ethnohistory*.”⁴⁴

Apart from Mark Walters’ innovative study, ethnohistorical methods remain foreign to legal history and the law of the fur trade remains only minimally investigated. The traditional subjects of study for legal historians are the development of particular legal rules or institutions, and the role of legal actors within those formal institutions. Within the field of legal history, disciplinary debates have centred on whether law is a function of power and other societal forces, thereby suggesting an “external” approach to the history of law, or alternatively, whether law is embedded within these social forces and itself constitutive of power relations and consciousness, thereby requiring an “internal” approach to its history, including taking doctrinal developments seriously.⁴⁵ These historiographical concerns do not contemplate law beyond the institutions of state,

⁴⁴ Mark D Walters, ““Your Sovereign and Our Father.” The Imperial Crown and the Idea of Legal-Ethnohistory” in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010) 91 at 93.

⁴⁵ This debate, represented by Willard Hurst (external) and Robert Gordon (internal), has been recently revisited in a symposium published in volume 37 of *Law & Society Inquiry* (2012), centred on Robert Gordon’s seminal essay, “Critical Legal Histories” (1984) 36 *Stanford Law Review* 57. See in particular, Susanna L Blumenthal, “Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History” (2012) 37 *Law & Social Inquiry* 167.

let alone law that may be cross-cultural (as opposed to merely comparative) with contributions from substantially different legal traditions. Such subjects of study have traditionally been the domain of anthropology and have always demanded an “internal” perspective in light of systems of law that are undifferentiated from other aspects of social and religious life.⁴⁶ They have not generally been considered within the domain of law.

As in other fields of historical research, Canadian legal historians have also long recognized the need to include different participants, different law, and particularly aboriginal law within its field of vision,⁴⁷ but some of these directions require different methodologies.⁴⁸ And as suggested above in relation to the exceptional nature of Mark

⁴⁶ I explored the need for an internal perspective in conducting this sort of research in Janna Promislow, *Looking for Law at York Factory* (LLM Thesis, York University, Faculty of Law, 2004), chptr 2.

⁴⁷ See, e.g., David H. Flaherty, “Writing Canadian Legal History: An Introduction” in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1981) 3 and Barry Wright, “Towards a New Canadian Legal History” (1984) 22 *Osgoode Hall L. J.* 349 (calling for a broader, ‘law and society’ approach to Canadian legal history). For examples of studies that exemplify these directions by addressing aboriginal peoples in Canadian legal history, see Sidney L. Haring, *White Man’s Law. Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1998); Douglas C Harris, *Landing Native Fisheries. Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) and *Fish, Law and Colonialism. The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 1999); Tina Loo, *Making Law, Order and Authority in British Columbia 1821-1871* (Toronto: University of Toronto Press, 1994); and Shelley Gavigan, *Criminal law on the Aboriginal plains: The First Nations and the First Criminal Court in the North-West Territories, 1870-1903* (SJD Thesis, University of Toronto Faculty of Law, 2008) [unpublished].

⁴⁸ Louis Knafla and Susan Binnie call for the inclusion of pluralist notions of law in legal history in Louis A. Knafla & Susan W. S. Binnie, “Beyond the State: Law and Legal Pluralism in the Making of Modern Societies” in Louis A. Knafla & Susan W. S. Binnie, eds., *Law, Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) 3.

Walters' study, the methodologies of Canadian legal history remain quite traditional.⁴⁹ In a recent historiographic essay, Louis Knafla notes the (still) large gaps in Canadian legal history in the treatment of the Northwest frontier and prairie provinces, which may be related to the persistence of a myth of lawlessness that has been prominent in American legal history as well.⁵⁰ Legal histories about the fur trade have generally been either a branch of Imperial legal history, trying to understand the legal effect of the Hudson's Bay Company Charter and British assertions of sovereignty over the Northwest,⁵¹ or a more practice-based consideration of the development of law within the Hudson's Bay Company forts, which had only limited and exceptional application to indigenous individuals who became involved with the trading posts.⁵² Legal histories of the fur trade

⁴⁹ That is not to say that Canadian legal historians do not welcome new methodologies. In my experience, Canadian legal historians have greeted my experiment with enthusiasm. The block to more development in this area is, if anything, the difficulty in carrying out such research. Some other projects that might be seen as related to mine include, Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria Faculty of Law, 2009) [unpublished](not aiming at legal history, but as a project of stating Gitksan law, necessarily has a historical aspect); and Shelley Gavigan "Prisoner Never Gave Me anything for What He Done": Aboriginal Voices in the Criminal Court" (2007) 3 Socio-Legal Review 71.

⁵⁰ Louis A Knafla, "Introduction" in Louis A Knafla & Jonathan Swainger, eds, *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005)1 at 4.

⁵¹ See, e.g., Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001)1; Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) Spring/Summer:37 Manitoba History 2; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 Manitoba L. J. 343; Hamar Foster, "Long-Distance Justice: the Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 Am. J. of Legal History 1; Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763: The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 Saskatchewan L. Rev. 123), and Geoffrey S. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D.Jur. Thesis, Osgoode Hall Law School, York University, 1981) [unpublished] at 1309-73.

⁵² See citations *supra* note 37. Cavanagh perhaps provides a bridge between both approaches to considering the Hudson's Bay Company's sovereignty.

have also included the development of formal western legal institutions at Red River, the only settlement (apart from in British Columbia) in which such institutions were established by the Hudson's Bay Company under the authority of its Charter.⁵³ What is missing is legal-historical treatment of the fur trade as a joint indigenous and European endeavour, a subject that requires studying indigenous law and its interactions with settler legal traditions.

In addressing such a topic, Hamar Foster suggests that "the researcher is faced at the outset with a considerable problem: the extent to which the details of these [indigenous] laws... are knowable. Not only are these details part of an oral tradition...they are embedded in social, cultural, and other practices in ways that make them difficult ... to see. There is also a limit to what can be recovered from between the lines of documentary accounts and from contemporary oral history fieldwork."⁵⁴ While there have been notable legal histories of intersocietal law in the fur trade, particularly in relation to "international homicide" as noted above and including a key study by Foster himself,⁵⁵ Foster's observations describe conditions that have perhaps scared most legal

⁵³ See Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis, 1972); Dale Gibson, *Privatized Justice: the Origins of Legal Institutions on the Canadian Prairies* (Winnipeg: University of Manitoba, Faculty of Law, 1993); Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51" (1999) 17 L. & History Rev. 209; Kathryn M. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land, 1839-54" in David H. Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981) 43.

⁵⁴ Hamar Foster, "Law and Necessity in Western Rupert's Land and Beyond, 1670-1870" in Louis A Knafla & Jonathan Swainger, eds, *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005) 57 at 63-64.

⁵⁵ See citations, *supra* note 36.

historians away. Indeed, legal historians have been noted for confining their subjects to ones that allow them to complete their studies “without looking far beyond the confines of the law library or the Westlaw or Lexis databases.”⁵⁶ However, as Hartog suggests, once the idea of law that informs legal history is less positivist, legal-historical inquiry then requires both internal and external perspectives, and the boundaries of the law are put into question regardless of cultural context.⁵⁷ Moreover, depending on the topics and eras pursued, the internal consciousness of the legal history of European societies may be no more accessible to Western lawyers than that of historical indigenous societies. William Ewald’s comparativist approach to the legal history of animal trials in medieval France provides a case in point.⁵⁸ Legal history thus conceived necessarily engages with the philosophy of law and requires openness to reconsidering the meaning and confines of law itself in the process of historical interpretation.⁵⁹

While the case studies pursued might have more in common with ethnohistory, there is a point to situating this work as a work of legal history. The point is simple:

⁵⁶ Hendrik Hartog, “Introduction to Symposium on ‘Critical Legal Histories’”: Robert W. Gordon. 1984. *Critical Legal Histories*. *Stanford Law Review* 36: 57-125” (2012) 37 *Law & Social Inquiry* 147 at 153.

⁵⁷ *Ibid.*

⁵⁸ William Ewald, “Comparative Jurisprudence (1): What was it Like to Try a Rat?” (1995) 143 *U Penn L Rev* 1889 and William Ewald, “The Jurisprudential Approach to Comparative Law: A Field Guide to ‘Rats’” (1998) 46 *Am. J. of Comparative L.* 701.

⁵⁹ Walters observes a tension between contextualist history and legal history, which insists on the pastness of the past, and legal and ethnohistorical interpretation, which demand or embed integrity with the present (*supra* note 44). Ethnohistory gains this dimension from its anthropological roots, and starting assumptions of cultural continuity, while legal interpretation brings historical precedents to bear on present day problems. In my view, this tension does not arise until one attempts to use a legal ethnohistory in legal argument. Although tensions remain between traditional historical interpretation and ethnohistorical methodologies (see citations at *supra* note 42), ethnohistorical studies are deeply contextual.

indigenous law is law.⁶⁰ Indigenous legal traditions and their interactions with fur trader legal traditions are part of Canadian legal history, even if we have yet to determine the significance of this law in constitutional law and history. No amount of difficulty trying to access and assess this law alters these important premises for this work. It is, on the other hand, possible to evaluate the material in three case study chapters as illustrating incomplete formations of law – both in terms of the limited scope of any intersocietal legal norms that governed relations, and in terms of whether it is appropriate to speak of principles of intersocietal law as having emerged at all.⁶¹ Such assessments do not refute the presence of prior legal systems of the indigenous and European trader; they only dispute the formation of shared legal norms or shared interpretive space. They also fall within the philosophical engagement with the concept of law demanded by this sort of study. Moreover, such observations fall within the intent of this study, which is to *question* the formation of intersocietal law rather than assume it occurred.

Although chapter two starts from a point of judicial interpretation to demonstrate the importance of ethnohistorical understandings for law, traditional legal history and aboriginal rights arguments are at most a shadow over chapters two through four. Chapter five, on the other hand, returns to legal methodologies and the use of history to support a

⁶⁰ John Borrows, “Creating an Indigenous Legal Community” (2005), 50 McGill L.J. 153 at 173; Borrows 2010, *supra* note 4; Val Napoleon, “Thinking about Indigenous Legal Orders” in René Provost & Colleen Sheppard, eds, (2013) 17 *Ius Gentium: Comparative Perspective on Law and Justice* 229.

⁶¹ See Webber, *supra* note 21 for an approach that suggests that whether the interaction produced legal norms as opposed to simply norms governing relationships and behavior is beside the point. However, his argument is how such norms became law through the aboriginal rights doctrines (if not before), and is not an attempt to produce a legal history of the inter-communal law for its own sake.

legal history and legal argument about the nature of treaties and their interpretation.

Historians such as Arthur Ray and Jim Miller have made important connections between the fur trade and treaties.⁶² As reviewed in chapter five, these arguments include understanding the relationships of the fur trade as a form of treaty themselves⁶³, and more recently, a more 'juridical' style of argument suggesting that fur trade institutions and relationships should inform the interpretation of treaty promises.⁶⁴ Chapter five takes up these arguments from a legal perspective, sorting through the implications of viewing indigenous-European relations during the fur trade as governed by law, including treaty relationships. It provides an opportunity to reflect on treaty rights jurisprudence as well as the processes by which *de facto* if not *de jure* sovereignty was acquired, and the role of treaties and less formally negotiated orders in such processes. Even if the fur trade gave rise to particular legal norms (and I argue it did in some circumstances), the legal interpretation of the significance of those historical norms in treaty rights litigation or in legal histories of the acquisition of sovereignty involves a normative analysis that draws on more than interpretations of history. So while fur trade studies may give rise to

⁶² See J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) [Miller]; Arthur J. Ray, Jim Miller & Frank J. Tough, *Bounty and Benevolence: A Documentary History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000) [*Bounty and Benevolence*]; Arthur J. Ray, *Telling it to the Judge. Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011) [Ray, *Telling*].

⁶³ See Miller, *ibid.*; Jean Friesen, "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1861-76" (1986) series 5, vol 1 Transactions of the Royal Society of Canada 41; and John E. Foster, "Indian-White Relations in the Prairie West during the Fur Trade Period - A Compact?" in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: University of Alberta Press, 1999 [1979]) 181.

⁶⁴ See *Bounty and Benevolence* and Ray, *Telling*, *supra* note 62.

particular legal arguments about particular treaties, chapter five is more concerned with how discussions and interpretations of treaties and treaty rights are framed, both in history and law. Finally, pushing through the connections between fur trade and treaty hinted at in the case study chapters brings the relationship between law and history into sharp relief, and so the relationship between the two disciplines also occupies our attention in this chapter.

3. The Results: Arguments, Contributions, and Directions

In spite of the limited scope of the research, clear themes and arguments emerge from these case studies about the content and nature of fur trade law that follow through into the arguments about treaties.

The interpretation of intersocietal law that emerges from the case studies is that there were shared norms – of process and occasionally substance – but that such shared normativity may have been fleeting and dependent on bi-culturally adept and interested traders. Several points of relationship might be articulated as specific, reasonably durable normative expectations or obligations across the different peoples, geographies and timelines of the case studies:

- That food (and tobacco) would be provided to visitors or traders, as a matter of hospitality and maintaining good relations, or as a matter of need.

- That relationships between European and indigenous trading parties would be re-affirmed before trade, generally with food and tobacco. However, in contrast to some accounts of the trading protocols,⁶⁵ the case studies indicate that the degree of ceremony varied with the status of the trader and that protocols were less elaborate in the context of increasingly individualized or family trading relationships following the Hudson's Bay Company's move inland.
- That the consent or welcome of local peoples was required before a trading post could be established in their territory. If the European traders wrongly identified the local leaders from whom they should seek consent, it seems probable that intra-indigenous law requiring consultation within and between bands and peoples mitigated against misidentification causing problems for the trading post, at least where those peoples were at peace. In addition, indigenous consent to European trader presence in the territory included commitments to some measure of mutual support.
- That the European traders had to ensure a reasonably continuous availability of trade goods as part of maintaining good relations and ensuring their continued welcome in the particular territories in which they had landed.
- That where European traders kept up their end of the bargain, they should be supported with assistance with harvesting activities and/or access to the resources

⁶⁵ See e.g., *Bounty and Benevolence*, *supra* note 62.

they needed. In the sub-arctic case study, there was a notable expectation of self-sufficiency that was not observable from the Hudson Bay contexts.

- That the respective leaders of the European and indigenous traders (if not communities) would be recognized with symbols and gifts.

There are other parameters and aspects of the order of trading relations that are observable through the case studies, but by identifying the above list as specifically normative, I am suggesting that the case studies were sufficient to show a degree of regularity and often a degree of sanction attaching to these practices, expectations, and obligations. Importantly, these specific norms did not just emerge from practice; they were the subject of negotiations and attempts by indigenous leaders in particular to educate the newcomers to their territories.

Some of these points defining the terms of exchange and relationship might be better described as indigenous law rather than intersocietal law in that the European traders did not necessarily bring any adaptation, adjustment, or even normative content to the indigenous modes of governance and business that were expected of them in fur trade country. On occasion, they continued to insist that the terms of the relationship were other than what was revealed by their conduct, or what they were able to demand of the conduct of their indigenous trading partners. This interpretation seems particularly strong in the MacKenzie Valley case study, and in relation to the expectation of self-sufficiency that was unique in that environment. Thus, the minimum content of intersocietal

normativity might be defined as the presence of at least competing norms capable of accounting for a given practice or conduct. To describe the domination of one system over the other and normative competition as intersocietal legal space is to attend to the persistence of other legal orders and their reaction to the dominant system.

These interpretations and the work of this dissertation also offer directions and contributions specific to the different fields from which this interdisciplinary study has drawn. In relation to fur trade histories, I hope I have portrayed law as an important part of indigenous-European relationships and as a viable subject of study that might add new dimensions to ethnohistorical research. The studies also bring attention to the need for greater contextual specificity around trading protocols — time, geography, and indigenous and company cultures are all potentially relevant in understanding the scope and nature of the ceremonies and modes of exchange that guided the conduct of the trade. Similarly, kin relations and kin metaphors did not always manifest themselves. In this regard, and in relation to the eighteenth century in particular, there are differences between relations with “home Indians” and “trading Indians” that are worth further exploration, including the extent to which these different patterns of relationships are reflected in the trade after the Hudson’s Bay Company moved inland and the increased inland competition sparked by this move.⁶⁶ In addition, the different forms and patterns of relationship may be of interest in reflecting on the emergence of new communities that

⁶⁶ See Cavanagh, “HBC”, *supra* note 37 for an interesting suggestion of the significance of the home Indians to the HBC’s establishment of sovereignty over a small scope of people and territory before 1763.

we might recognize now as Métis. Finally, the prominence of “friendship” as the dominant form of trading relationship suggests that this signifier deserves further elaboration in regard to the expectations and obligations encompassed by this term.

With regard to legal histories and aboriginal rights discourse, the arguments and contributions are addressed in depth in chapter five. This study highlights mercantilist relationships that do not fit easily within settler-colonial Imperial legal histories or legal constructs and yet account for the longest period of indigenous-European relations in what is now Canada. From those contexts, this dissertation offers interpretations and arguments at a more abstract level of narrative, which are, in my view, the most significant and transferable results of my study. The language of intersocietal law is often associated with an idea of shared norms encompassing shared understandings.⁶⁷ This view is embedded in Canadian treaty rights jurisprudence, which defines treaty rights by identifying a “common intention.”⁶⁸ This dissertation demonstrates that shared normative worlds do not necessarily involve shared or merged legal sensibilities, common intentions, or middle grounds of convergence and synthesis. Instead, the shared normative worlds of the fur trade were often ones of competing norms capable of generating and maintaining persistent misunderstandings. Incremental adaptations, shared humanity, and convergent motivations ensured that the parties did not abandon each other. Thus, the processes of intersocietal law are not necessarily transformative. In spite

⁶⁷ See discussion in chapter three especially.

⁶⁸ Explored at length in chapter five.

of such a limited conception, the intersocietal law of the fur trade demonstrates that such processes of law can support robust working relationships and give rise to durable normative expectations between parties.

Chapter 2: One Chief, Two Chiefs, Red Chiefs, Blue Chiefs Newcomer Perspectives on Indigenous Leadership in Rupert's Land and the North-West Territories

In 1995, a case came before the Federal Court of Canada in which the Sawridge First Nation from Slave Lake, Alberta, attempted to assert an Aboriginal right to control its membership.¹ Justice Muldoon concluded that any such right was “emphatically extinguished” by clear acts of Parliament, a conclusion that he reinforced through historical evidence combed from treaty negotiation records.² Justice Muldoon’s decision was thrown out the following year after the Federal Court of Appeal found a reasonable apprehension of bias in his judgment, but his interpretation of the evidence from the Treaty 6 record in particular nevertheless merits our attention.³

* In Hamar Foster, Benjamin L. Berger, & A.R. Buck, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 55. Acknowledgements: My thanks are due to Kent McNeil, Susan Drummond, and the editors of this volume, whose insightful comments and subtle suggestions have substantially improved this chapter. I would also like to acknowledge that this research has been supported by the Social Sciences and Humanities Research Council of Canada. Last, but certainly not least, I would like to thank John McLaren for opening my eyes to the intrigues of comparative colonial history and for his constant encouragement of my studies. There have been small editorial changes to this chapter since publication.

¹ *Sawridge Band v. Canada* (1995), [1996] 1 F.C. 3 (T.D.). More specifically, the Sawridge (Treaty 8), Ermineskin (Treaty 6), and Sarcee (now Tsuu T’ina, Treaty 7) First Nations argued that changes to the Indian Act, R.S.C. 1985, c. I-5, restoring band membership to women who had married non-Indian men and to the children of these unions, violated their rights to control their memberships under s. 35 of the Constitution Act, 1982 and were contrary to long-standing customs whereby women’s band membership followed that of their spouse.

² *Ibid.* at para. 72.

³ *Sawridge Band v. Canada*, [1997] 3 F.C. 580 (C.A.). It is worth noting that the Court of Appeal found that Justice Muldoon did not appear to harbour negative views of Aboriginal people per se, but rather that a reasonable apprehension of bias arose due to comments that indicated his negative disposition toward the regime of distinctive rights for Aboriginal peoples enshrined in s. 35 of the Constitution (at paras. 15-16). In the aftermath of this decision, a new trial was commenced, and the matter remains hotly contested and unresolved. See *Sawridge Band v. Canada*, 2008 FC 322. Justice Muldoon also considered evidence from

Much of the evidence cited by Justice Muldoon was drawn from the reports kept by Treaty Commissioner Alexander Morris, Lieutenant- Governor for Manitoba and the North-West Territories. Morris was the lead Crown negotiator for Treaties 3, 4, 5, and 6, which were negotiated with primarily Cree, Assiniboine, Ojibway, and Saulteaux peoples in the 1870s. In pursuing these numbered treaties, the Canadian government believed it was clearing the way for peaceful settlement of the west in accordance with long-established British principles.⁴ Treaty 6 was concluded in 1876 with First Nations who lived across what is now south-central Alberta and Saskatchewan. Morris' preparations for the negotiation of this Treaty included commissioning Methodist missionary Reverend McDougall to visit the Indians of this region the year before Morris planned to arrive. McDougall's purpose was to "tranquillize" the Indians by informing them of the government's intention to negotiate a treaty, an issue that was causing some concern in the region.⁵

Justice Muldoon cited Reverend McDougall's report to Morris about his mission as evidence of the extinguishment of self-government rights. In this report, McDougall

Treaties 7 and 8, covering all of the treaties signed by the First Nations who brought the case. The choice to focus on Justice Muldoon's treatment of the evidence from Treaty 6 is one of convenience, and the interpretive exercise pursued in the chapter could undoubtedly be extended to his treatment of the evidence in the Treaty 7 and 8 records as well.

⁴ For discussions of the government's approach to treaties in this era, see e.g. John Leonard Taylor, "Canada's Northwest Indian Policy in the 1870s: Traditional Premises and Necessary Innovations" in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987; first published 1979) 3; and Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples* (Toronto: McClelland and Stewart, 1992) at c. 17-19.

⁵ See Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Calgary: Fifth House, 1991; first published 1880) at 172-73.

described the reception of the Governor's message and also conveyed several requests from the Plains Cree regarding the upcoming negotiations. Among those requests was the following: "We would further ask that our chiefships be established by the Government. Of late years almost every trader sets up his own Chief and the result is we are broken up into little parties, and our best men are no longer respected."⁶ Taken without attention to the interpretive dimensions of language, historical context, and the personality and interests of the narrator, these words imply that Plains Cree leadership and government were in total disarray before the negotiation of Treaty 6.

Justice Muldoon pursued this ostensibly straightforward interpretive route, bolstering his conclusion with further choice quotes from Morris' treaty record. For example, he cited Morris' report of the following speech to the Willow Indians, a band of Plains Cree: "One of you made a request that if he were accepted as a Chief, he should have a blue coat. I do not yet know who the Chiefs are. To be a Chief he must have followers. One man came forward as a Chief and I had to tell him unless you have twenty tents you cannot continue as a Chief."⁷ These passages evoke the colonial milieu of Treaty 6, a milieu marked by a long interaction between colonial authorities and indigenous communities during the fur trade that affected the legal and political institutions of both societies.⁸ The complexities of these interactions, however, are not

⁶ *Ibid.* at 175, cited in *Sawridge*, *supra* note 1 at para. 85.

⁷ Morris, *supra* note 5 at 226, cited in *Sawridge*, *supra* note 1 at para. 83.

⁸ In the North American contexts of this chapter, see Toby Morantz, "Northern Algonquian Concepts of Status and Leadership Reviewed: A Case Study of the Eighteenth-Century Trading Captain System" (1982)

conveyed on the face of these passages. Instead, they leave a strong impression that at the time of Treaty 6, Plains Cree chiefs were dependent on colonial recognition for their political authority. In *Sawridge*, Justice Muldoon saw these passages as demonstrating that the Cree leaders lacked self-defined political authority, implying a further lack of control over the definition of the political unit. In his view, this constituted conclusive evidence that any right of control over membership was extinguished at the time of the Treaty, as a condition of making it. According to him, not only had the ancestors of the First Nations who brought this challenge surrendered control over their membership, but they had themselves acknowledged the absence of control and requested the assistance of the Dominion government.⁹

Many problems, some historical and some legal, can be ferreted out of Justice Muldoon's decision. Given that it was overturned, its significance lies not in its legal implications, but rather in what it reveals about the problem of political recognition across cultural divides and the interpretation of such problems in historical contexts, particularly when self-government rights are at stake. The significance of the *Sawridge* decision, then, is understanding what to make of Justice Muldoon's finding of radical

19 Canadian Review of Sociology and Anthropology 482 (regarding the institutions of indigenous peoples); Arthur J. Ray, "The Factor and the Trading Captain in the Hudson's Bay Company Fur Trade before 1763" in Jim Freedman and Jerome H. Barkow, eds., *Proceedings of the Second Congress, Canadian Ethnology Society*, vol. 1, Mercury Series, Ethnology Service Paper 28 (Ottawa: National Museum of Man, 1975) 586; and John E. Foster, "The Indian-Trader in the Hudson Bay Fur Trade Tradition" in Freedman and Barkow, *ibid.*, 571 (regarding the institutions of the Hudson's Bay Company). For an excellent exploration of this thesis in colonial legal history more generally, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002).

⁹ *Sawridge*, *supra* note 1 at 86.

discontinuity in Plains Cree political life and how such interpretations of the historical record come to be constructed.

In using the *Sawridge* case as a window on the complexity of colonial interactions around political authority, this study builds on socio-legal approaches to colonial legal history that John McLaren and his colleagues and admirers have pioneered in Canada, Australia, and New Zealand over the last three decades. In addition to being the engine behind much of this scholarship, McLaren's work demonstrates how situating historical legal doctrines, actors, and debates in their full social and political contexts produces a richer understanding of law and legal processes.¹⁰ This chapter intends to emulate this fine McLaren tradition by situating the dilemmas of leadership and political community implicated by the Treaty 6 record in a more complete historical picture than is apparent from the discussion in *Sawridge*. It is thus an effort to correct the impression left by Justice Muldoon's interpretation of the Treaty 6 passages cited above — to answer his interpretation of the history with more history by asking how it came to be that the Plains Cree would ask for government assistance in “establishing” their chiefs.

Pursuing this question necessitates looking beyond the Treaty 6 record into the colonial relationships that preceded and shaped the Treaty negotiation. This quest takes

¹⁰ Three recent examples include John P.S. McLaren, “Reflections on the Rule of Law: The Georgian Colonies of New South Wales and Upper Canada, 1788-1837” in Diane Kirkby and Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001); McLaren, Robert Menzies, and Dorothy E. Chunn, eds., *Regulating Lives: Historical Essays on the State, Society, the Individual, and the Law* (Vancouver: UBC Press, 2002); and McLaren, A. R. Buck, and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005).

us into the practices used by the Hudson's Bay Company (HBC) and other European traders to encourage indigenous people to take part in the trade; it also involves examining the relationships between these men and their indigenous trading partners. The investigation will not, however, pursue direct connections between players who negotiated treaties and the participants who shaped relations during the fur trade. Such connections are difficult to make because, although many participants in the treaty negotiations are named and identified, most of the Indians who traded with the HBC in earlier eras are not named in the written record.¹¹ Moreover, though European traders identified the band and kinship ties, geographic residence, and larger national or tribal affiliations of their indigenous trading partners to the best of their knowledge, their knowledge was frequently incomplete and left something to be desired. As a result, this inquiry attempts a goal that is less ambitious than tracing the history of a particular group of Plains Cree from their fur trade relations to their treaty negotiations. Its aim is to portray general patterns to situate the Treaty 6 episodes discussed above and to set a backdrop against which we can imagine continuity in Cree governance structures, even in the face of colonial interference and disruption.

This discussion highlights the methodological concerns that shape interpretive projects of this sort. Ethnohistorical studies and approaches will be relied on to deconstruct the conclusions reached in *Sawridge* and to rebuild the picture, a process that

¹¹ See Theodore Binnema, *Contested and Common Ground: A Human and Environmental History of the Northwestern Plains* (Norman: University of Oklahoma Press, 2001) at 15.

exposes the sources upon which narratives of interference and disruption have been grounded.¹² This attention to how narratives of colonial relations are constructed demonstrates that even confident historical interpretations are permeated by ambiguities that strike at the foundations of our understandings of these relations. Although these ambiguities are often the point of debate and intrigue for historians, this chapter will turn the question back to *Sawridge* and invite the reader to consider the different purposes served by historical interpretation when undertaken by judges, particularly in the course of determining Aboriginal rights claims.

The starting point for these explorations is recognizing that Justice Muldoon's interpretation of Plains Cree governance from the Treaty 6 record is, from a certain perspective, unremarkable. It is simply a recent addition to a long-standing colonial tradition of confusion around indigenous political forms that runs the gamut from misapprehension to manipulation. Examples from other treaty histories illustrate this. For instance, the Crown entered into the Robinson-Huron Treaty with the Ojibway in 1850 to settle their respective land rights north of Lake Huron. One Ojibway Chief became a signatory to the Treaty even though his territory was on the American side of the

¹² Ethnohistory combines traditional historical methods with insights from other fields and sources, including ethnography, anthropology, archaeology, and oral traditions. The inclusion of such diverse sources is intended to allow for greater insight into peoples who did not participate in the creation of the written record. See Jennifer Brown and Elizabeth Vibert, eds., *Reading beyond Words: Contexts for Native History* (Peterborough, ON: Broadview Press, 1996) at xxii-xxiii.

border.¹³ Similarly, in 1921, Treaty Commissioner H.A. Conroy concluded Treaty 11 negotiations at Fort Simpson with “Old Antoine” while the spokesperson selected by the people themselves, “Old Norwegian,” went to eat lunch.¹⁴ The Indian Act codified the tradition, producing legendary disruptions and distortions in Aboriginal governance and citizenship practices, leading to cases such as *Sawridge*.¹⁵ And the tradition is being reproduced in contemporary settings, in which comprehensive treaties between the Crown and particular First Nations and Métis peoples are contested by other nations who assert that they also have rights and jurisdiction in the same region but have been excluded from the negotiations.¹⁶ Whether arising from innocent misconceptions or

¹³ See Janet E. Chute, “Ojibwa Leadership during the Fur Trade Era at Sault Ste. Marie” in Susan Sleeper-Smith, Jo-Anne Fiske, and William Wicken, eds., *New Faces of the Fur Trade: Selected Papers of the Seventh North American Fur Trade Conference*, Halifax, Nova Scotia, 1995 (East Lansing: Michigan State University Press, 1998) 153 at 167. The Chief was Oshawano, also known as Cassaquadung, of the Crane dodem. Chute remarks that “The Indian Affairs Department had so little idea of the composition of the Sault bands that it is doubtful they ever realized they had included an American Crane chief in their negotiations” (at 167). She also notes that the “error” was eventually corrected with the deletion of Oshawano’s name from the Treaty text in 1859.

¹⁴ Evidence of Louis Norwegian, *Proceedings of Re Paulette*, vol. 2 at 149-52; Evidence of Phillip Lafferty, vol. 2 at 224-29; and Evidence of Charlie Cholo, vol. 2 at 237-38. Louis Norwegian’s evidence is reproduced in René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, rev. ed. (Calgary: University of Calgary Press, 2004; first published 1975) at 446. See also Fumoleau, *ibid.* at 98-101, for a description of events in the negotiation of Treaty 8 at Fort Resolution.

¹⁵ For a discussion of some of the highlights of this history, see Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16:1 C.J.L.S. 113. For recent case law, see *Mclvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827.

¹⁶ See e.g. *Paul v. Canada*, 2002 FCT 615 (the North Slave Métis Alliance failed in its application for an injunction to prevent the completion of the Dogrib Final Agreement, claiming that it had rights within the territory covered by the Agreement, that it had not been represented in its negotiation, and that the Dogrib Agreement would prejudice its rights); and *Gitanyow First Nation v. Canada*, [1998] 4 C.N. L.R. 47 (B.C.S.C.) (the Gitanyow First Nation sought declarations that, first, the Crown had a duty to negotiate with it in good faith (granted: (1999), 66 B.C.L.R. (3d) 165, leave to appeal granted 1999 BCCA 343), and, second, the completion of the Nisga’a Agreement prevented the Crown from negotiating with it in good faith because it claimed rights within the territory covered by the Agreement and the Agreement prejudiced

intentional interference, the failure on the part of colonial administrations to grasp and respect the dimensions of indigenous political life is ongoing.

The problem of political recognition is also a theme that animates colonial history more generally. The history of North America (and beyond) is replete with examples of mixed success on the part of colonial authorities in their attempts to recognize and gain influence over indigenous leaders. The historiography of this issue, mixed as it is with other aspects of colonial encounter, once portrayed contact as having a fairly immediate and disruptive impact on indigenous societies and their forms of social and political organization. The force of European culture and its technology was portrayed as pervasive. Inherent in such narratives were the classic dualisms of savage and civilized, heathen and Christian, nature and society, all of which fed a presupposition of superiority on the part of those who recorded the encounter as well as many who later interpreted that record. With the advent of the “new Indian history,” however, the story has become much more complex.¹⁷ Although narratives of disruption and devastation implying radical cultural (and political) change remain, they are told alongside stories of resistance and continuity. A key theme in this shift has been an emphasis on individuals and their significance as cross-cultural mediators.¹⁸ Through these individuals, we begin to see past the macro-level shifts in behaviour brought on by contact and technological change to

its rights. The parties have since set aside the litigation and are seeking a resolution of these matters through negotiation).

¹⁷ See Daniel K. Richter, “Whose Indian History?” (1993) 50 *William and Mary Quarterly* 379.

¹⁸ See e.g. James Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: Norton, 1999).

how things looked on the ground, and how individuals drew from centuries-old logic to grapple with new situations.

Taking these common themes back to the relations that set the stage for Treaty 6, our exploration begins with the story of a Chief named The Bearded from the early years at York Factory, an HBC trading post located in present-day northern Manitoba.

Although these events predate the Treaty 6 negotiations by almost two hundred years, several parallels exist between them. Occurring very close to the point of first contact in the York Factory region, this story contradicts histories that portrayed European contact as disruptive of previously “pristine” and static structures of leadership and governance amongst the Cree.¹⁹ Instead, a more subtle narrative emerges, one that recognizes the influence of Europeans as new trading partners and allies, but also leaves room for adaptive and even renegade behaviour by individuals manoeuvring in a world of indigenous politics that remained beyond view. This account will be followed by a brief and more generalized examination of HBC practices regarding the recognition of leaders among their Cree trading partners before returning to the late nineteenth century to revisit the negotiation of Treaty 6.

¹⁹ See e.g. E.E. Rich, *Hudson's Bay Company, 1670-1870* (New York: Macmillan, 1960) vol. 1 at 1670-1763. See generally Michael Payne, “Fur Trade Historiography” in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds., *From Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 3; and Toby Morantz, “Old Texts, Old Questions: Another Look at the Issue of Continuity and the Early Fur-Trade Period” (1992) 58 *Cdn. Historical Rev.* 166.

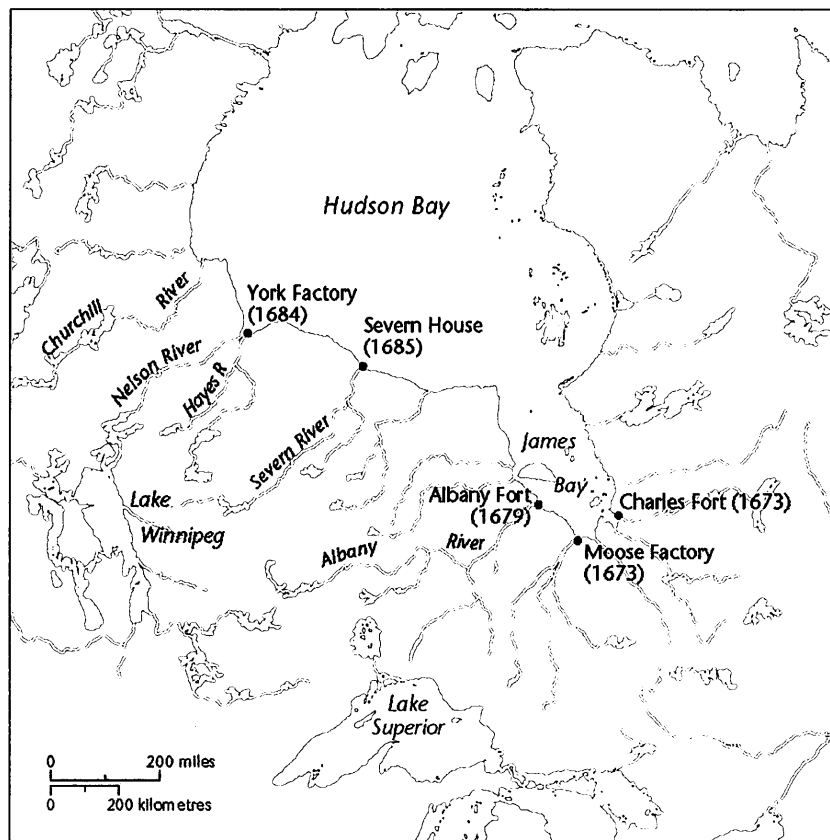
1. One Chief, Two Chiefs: Radisson, The Bearded, and the Settling of York Factory

In 1682, the French and the English extended their colonial rivalry into the area that eventually included York Factory, one of the most significant HBC establishments in the early fur trade (see Maps [1] and [2]). Their interests in securing this location were fairly obvious. With two large rivers — the Nelson and the Hayes — merging to flow into Hudson Bay, it was ideally situated for Cree, Assiniboiné, and other inland peoples to travel to the coast to trade furs, giving the European traders unparalleled access to desirable inland furs without having to travel into these unknown territories themselves. Moreover, the access to Hudson Bay from the Atlantic was also convenient for transport of goods and supplies between Europe and North America. Eventually, the English secured their claim to this region as against the French through the Treaty of Utrecht in 1713, but the trading post changed hands several times in the preceding thirty years, with both the French and the English attempting to establish their presence there in 1682-83.

In the process of competing for the York Factory region, the HBC and French traders followed what was by then fairly standard colonial patterns in dealing with the indigenous peoples of the area. There is no report of the diplomatic efforts undertaken by the HBC officers who first landed there, but we do know that the company instructed its

officers to settle “leagues of friendship” with the peoples who inhabited these lands and later claimed that they had done so.²⁰

The record left by the French is more detailed. Their team was led by Pierre Esprit Radisson, an experienced trader well schooled in the arts of diplomacy amongst Algonquian peoples through his earlier experience



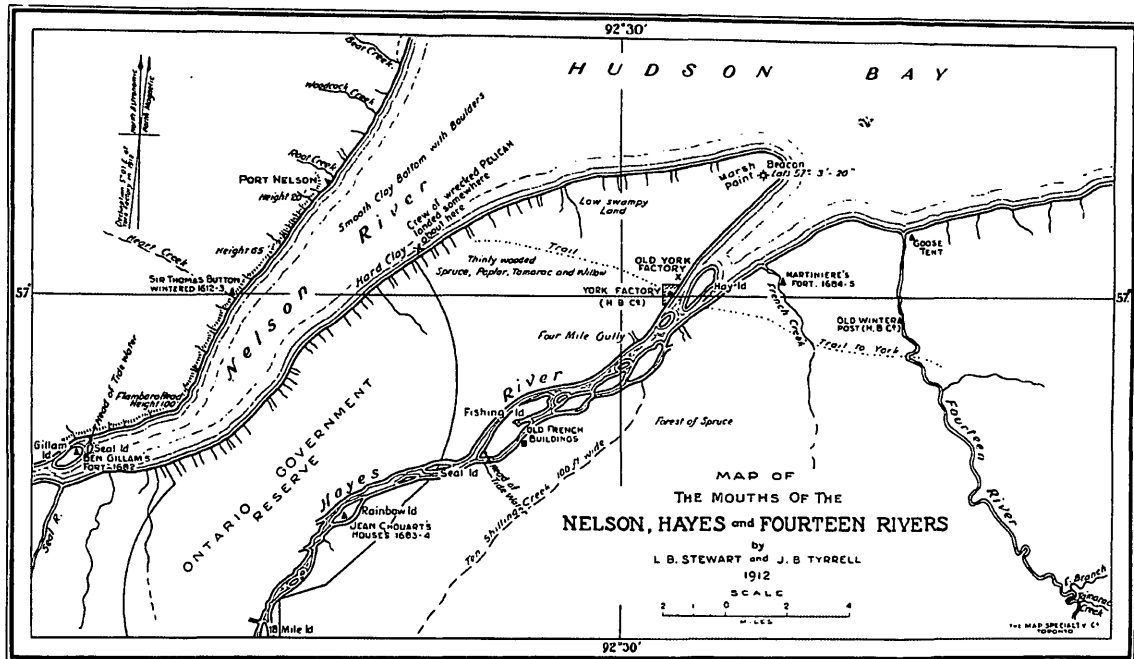
Map 1: Early trading posts of the Hudson's Bay Company
Cartographer: Eric Leinberger

²⁰ For the instructions, see “Letter to John Nixon, 21 May 1680” in E.E. Rich, ed., *Copy-book of Letters Outward &c. Begins 29th May, 1680 Ends 5 July, 1687* (Toronto: Champlain Society, 1948) at 9 and 12-13. For the company's claims, see Memorial prepared by James Hayes, undated [est., 1682] in Rich, *ibid.* at 70-71.

in the Great Lakes region and a key player in the HBC's earliest explorations of Hudson Bay before he switched teams to lead the French efforts in the York Factory region. Radisson left a journal documenting this mission, and his report confirms adherence to French practices of gift-giving and establishing kin relations with the local populations.²¹ He describes making contact with the Swampy Cree people inhabiting the Hayes River basin shortly after arriving in the York Factory region in 1682.²² Soon after contact was established, Radisson participated in a small gathering during which he and the leader of the Hayes River Cree made speeches, exchanged gifts, and smoked pipes of tobacco. Through this process, Radisson was adopted by the Hayes River Chief as his son, and

²¹ Canada, "Relation of the Voyage of Pierre Esprit Radisson to the North of America in the years 1682 and 1683" by Pierre Esprit Radisson in "Report of the Minister of Agriculture for the Dominion of Canada, 1895," *Sessional Papers*, no. 8a (Ottawa, 1896). See also Gideon D. Scull, *Voyages of Peter Esprit Radisson* (New York: Burt Franklin, 1967). For descriptions of French-Indian diplomacy in the sixteenth and seventeenth centuries, see Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Regions, 1650-1815* (Cambridge: Cambridge University Press, 1991).

²² The Swampy Cree inhabited the swampy lowlands near the coast of Hudson Bay. They are distinct from the Woodland Cree, who lived inland from the bay in the surrounding boreal forest, and from the Plains Cree, who lived further inland still and hunted buffalo on the plains. In spite of their different homelands, these peoples spoke dialects of a common language. See Victor P. Lytwyn, *Muskegowuck Athinuwik: Original People of the Great Swampy Land* (Winnipeg: University of Manitoba Press, 2002) at c. 1.



Map 2: York Factory region

Published with the permission of the Champlain Society

he himself promised to protect the Chief and his kin as if they were his own.²³ Radisson believed that this ceremony gave him and his men permission to build a trading house in the Chief's territory and to conduct commerce there.²⁴

Radisson makes it sound so easy. He arrives and in no time manages to establish an alliance and adoptive relationship with the most important person in the region. But how did Radisson know that he had the right man? By his own account, upon landing in unfamiliar territory, he located the Chief via the simple expedient of asking the first

²³ Radisson, *supra* note 21 at 11, 13; Scull, *supra* note 21 at 262-64.

²⁴ Radisson, *ibid.* at 11, 13, 77; Scull, *supra* note 21 at 262-64, 355.

group of Indians that he met.²⁵ By some happy coincidence, the first person he asked was the Hayes River Chief himself, who, after appropriate words and ceremonies were exchanged, immediately granted Radisson the permissions he sought. It was also convenient that the Hayes River people were eager to form an alliance with Europeans such as Radisson and his men. These people were well aware of the existence of the Europeans and their goods — particularly their guns — through their allies and kin networks. Their more southerly Swampy Cree relatives in western James Bay had already been in contact with European traders for almost a decade, and their Ojibway neighbours around the Great Lakes for the better part of a century. This prior knowledge of Europeans and their guns is confirmed by Radisson's report that, upon learning of his intention to establish a trading house and enter into a trade and alliance with them, one of the elders of the Hayes River people said, "Young men, you have no longer anything to fear. The sun has become favourable to us, our enemies will fear us, since here is the man whom we have been seeking since our fathers were born."²⁶ But none of these dimensions of the encounter helps us understand whether Radisson had formed this

²⁵ Radisson, *ibid.* at 11; Scull, *supra* note 21 at 263.

²⁶ Radisson, *ibid.* It is not clear from the record whether this elder was the Chief who had adopted Radisson as his son. It is perhaps worth considering whether this statement of anticipation was specific to Radisson, as, given his exploits and travels in the Great Lakes region, his reputation may have preceded him. Ultimately, however, this seems unlikely. Radisson's earlier travels took place in the 1650s and 1660s, and the speaker referred to the time in which their "fathers were born." This means that, were the anticipation specific to Radisson, the speaker would have to be quite young, a conclusion that is unlikely given Radisson's description of him as an elder.

important relationship with the right man. Indeed, some incidents he reports from the following year give us pause.

After establishing a relationship with the Hayes River Cree, Radisson went back to Europe and left his nephew, Jean Baptiste Chouart, in charge of the fledgling French trading house they had built near the mouth of the Hayes River.²⁷ Shortly after Radisson left, a different group of Cree from the New Severn River, located to the south of the Hayes, were travelling near the French trading house. These people had already formed a trading relationship with the English who, since 1674, maintained a presence at the mouth of the Albany River in James Bay. Aware of these prior associations, the French were nevertheless keen to attract new customers. They greeted the New Severn people, told them of their purposes in seeking trade, and invited them to come to the trading house to smoke tobacco with them. Upon arriving at the French trading house, one of the party left and returned two days later. He, too, was greeted with tobacco, as was the custom of the land, but he came with unfriendly intentions. He took the unarmed Chouart aside and informed him that “[he] was worthless because [he] did not love the English and that [he] had not paid by presents for the country [he] inhabited to him who was the chief of all the nations and the friend of the English at the head of the bay.”²⁸ After proclaiming himself “chief of all the nations,” this man escalated his insults until the

²⁷ Jean Baptiste Chouart, also known as Jean-Baptiste Des Groseilliers, was the son of Médard Chouart Des Groseilliers, the other famous French explorer who accompanied Radisson on his first mission on behalf of the HBC in 1667.

²⁸ Radisson, *supra* note 21 at 67.

exchange degenerated into a scuffle. Chouart was injured but, by his report (through Radisson), was still able to gain the upper hand. The scuffle attracted the attention of the other New Severn people and Frenchmen at the fort, and Chouart was told that the man he held was an English mole to whom gunpowder and other goods had been promised if he succeeded in killing all the Frenchmen at the fort. The moment passed and Chouart, in a show of generosity (again, by his report), permitted all the New Severn River Cree to leave.

When the Hayes River people learned of this incident, they were not satisfied to leave the dispute unresolved and the plot against their allies unanswered. They called the New Severn people back to the French trading house for a council and feast to “learn the merits of the case.” Instead of diffusing the tensions, however, the meeting simply worsened the dispute. Insults were traded until the man who had described himself as a chief to Chouart was assaulted and killed on the spot.²⁹ The Hayes River Cree went on to attack the nearby English post, escalating tensions throughout the region and beyond. With the threat of retaliatory attacks readily apparent, the French convinced several Hayes River Cree to stay with them throughout the winter for security. When the rivers were once again passable in spring, Chouart reported that “several detachments of friendly nations arrived to relieve us,” including some from much further south.³⁰ The

²⁹ Radisson, *ibid.*

³⁰ Radisson, *ibid.* at 71. According to the narrative, these detachments included more than four hundred men from the “Assinipoetes,” who had come on the strength of alliances with Radisson that predated this mission along the Hudson Bay coast.

rivalry between the French and the English was thus taken up by their respective allies among the indigenous nations. Less apparent from this narrative, however, is how this rivalry might have been overlaid onto pre-existing or latent rivalries among the indigenous nations.

It was to these tensions that Radisson returned in the summer of 1684, with the surprising news that he was in the service of the English once again.³¹ Radisson then had the delicate task of converting his loyal Hayes River and other allies into friends of the English and enemies, or at least “strangers,” to the French. During this process, he had a conversation with his adoptive father, the Hayes River Chief from whom he had originally received permission to settle in the York Factory region on behalf of the French. According to Radisson, the Hayes River Chief had learned “that the chief of the nation which inhabits the upper part of the river New Severn, named The Bearded, and one of his sons, who were his relations, had been killed when going to attack those among the Indians who had felt it their duty to maintain the Frenchman [Chouart] who had been wounded by an Indian gained over by the English.”³² In this recounting, the New Severn Chief — identified as “The Bearded” — and his son are differentiated from

³¹ When the French merchants seemed uninterested in advancing or taking advantage of Radisson’s explorations of Hudson Bay, Radisson sought greener pastures back with the English. See E.E. Rich, *supra* note 19 at 158-62.

³² Radisson, *supra* note 21 at 77.

the man who was “gained over” by the English and who proclaimed himself to Chouart as “chief of all the nations.”³³

Perhaps the man who described himself in this manner was the leader of a different band of New Severn people or was a rival of The Bearded. Perhaps he was not a leader at all and was hoping his association with the English would help establish him as one. Or perhaps, in spite of the Hayes River Chief’s report (delivered via Radisson), this man was The Bearded himself, or a different son, or another relative. We cannot be certain. But if we take Radisson’s second-hand recounting as a reliable report of events, what we do know is that there were overlapping if not competing claims of authority regarding whose permission was required by the Europeans wanting to establish a presence in the York Factory region. Equally interesting for our purposes is that, though we cannot assess the strength of the claims to this authority, the Hayes River Chief’s identification of The Bearded as kin and fellow Chief nonetheless indicates that political authority was established and recognizable amongst the Cree, if not their European trading partners.

There is one final postscript and one more player to add before closing this tale. Captain Geyer, the HBC’s bayside governor, was also in the York Factory region during the summer of 1684, continuing construction of the company’s fort.³⁴ Anxious to

³³ In Lytwyn’s interpretation, *supra* note 22 at 129, the man who sparked the conflict by demanding that the French recognize him as Chief is identified as The Bearded.

³⁴ Radisson, *supra* note 21 at xxiii, identified this man as Captain “Gazer,” but, as explained by Douglas Brymner, the archivist who compiled Radisson’s narrative, Gazer was most probably Captain Geyer. See

introduce the Hayes River Chief to him, Radisson called Geyer to meet him and the Chief before he sailed back to England. Introducing the Chief to Geyer was a measure that would confirm Radisson's renewed connection with the English and reassure the Chief that he too would benefit from the relationship with the English and their continued alliance. The meeting with Geyer, however, did not go well. Radisson suggested that Geyer give some presents to his adoptive father. He emphasized that such presents were necessary for two reasons: first, to demonstrate respect for the Hayes River Chief's authority in the region in which they were building the English fort; and second, to fulfill a promise of gifts that Radisson had made the previous year, which would both confirm their relationship and preserve his reputation. Geyer bristled at Radisson's suggestion. As Radisson explains, Geyer

took this in bad part and was irritated even against the chief, without any reason, unless it was that he was my adopted father. I learned afterwards that he was annoyed because on my arrival I had not given any presents to a common Indian, who served him as a spy, and was son of the chief called "The Bearded," which would have been a horrible extravagance; for besides the Governor being inferior to me, I was not obliged to acknowledge his favourite, and I have never made presents except to the chiefs of these nations.³⁵

Radisson's words, which show his disdain for the company's bayside governor, also reveal his concern that Geyer's conduct should uphold his honour in the relationships he had formed while acting for the French. We might also say that Geyer was similarly

also Alice M. Johnson, *Dictionary of Canadian Biography Online*, vol. 1, ed. by John English and Réal Bédard, s.v. "Geyer, George," online: Library and Archives Canada <http://www.biographi.ca/>.

³⁵ Radisson, *ibid.* at 77. In Scull, *supra* note 21 at 354-55, the "common Indian" in this passage is replaced with a "simple savage," a direct translation from the French.

concerned, or perhaps simply disliked Radisson and did not want to recognize his authority and superior knowledge of Hudson Bay. In any event, it is unlikely that either of these men took kindly to entertaining the other's allies. To do so would not only acknowledge the rival officer's authority, but might also imply that he himself had been wrong — that he had not identified the “right” leader or leaders to work with in the first place.

Although this tale of political conceits has only one narrator — Radisson — it nonetheless provides three different versions of related events, offering a number of claims regarding both the identity of the regional Cree leaders and the scope of their authority. First, Chouart, through Radisson, reported the New Severn Cree man's claim to being “chief of all the nations” and the person to whom presents were owed. Second, the conversation between Radisson and the Hayes River Chief identified The Bearded as the New Severn Chief and implied that, although loyal to the English, this Chief and at least one of his sons were not involved in the original incident concerning Chouart. And third, the report from Radisson's dealings with Geyer indicates that The Bearded's son was an English spy, increasing the probability that the individual who described himself as Chief of all the nations had also been a son of the New Severn Chief. Further, the disagreement between Radisson and Geyer about who properly merited their respects in establishing their trading presence in the York Factory region may have indicated overlapping or competing indigenous claims or simply ignorance on the part of the Europeans. The reports are nevertheless consistent that there was a New Severn Chief known as The

Bearded who died in the ensuing hostilities. What else can we know? Did the Hayes River Chief have the authority to grant Radisson permission to establish the French trading post, or did Radisson also require permission from The Bearded? How extensive was the influence of these two Chiefs, and to what extent was it bolstered by their newly formed connections with the French and the English, respectively? What were the contours of the relationship and the reciprocal obligations between the New Severn Cree and the Hayes River Cree? And what of other relationships formed and tested through this tale: between adopted sons and fathers, between chiefs, their sons, and their larger kin relations?

If we trust Radisson's account, the Hayes River Chief was the right man with whom to curry favour in trying to establish a foothold in the region where York Factory was eventually built. The Bearded was a neighbouring Chief, to whom they owed no special favours in respect of building on that land, and Geyer was foolish to assume that The Bearded's son automatically carried the mantle of Chief through his father. If we continue along this line and assume for the moment that the man who claimed to be "chief of all the nations" was The Bearded, this claim was a renegade one. If he was not The Bearded, its renegade quality is even more obvious. It was a claim that pushed the status quo, at least as assumed by Radisson and his entourage. It constituted a power grab, either by a person who already had some power or by one who was more audaciously seizing the moment to get some. But this interpretation of the claim follows only if Radisson's assessment of the Hayes River Chief and his authority was correct.

The possibility that Radisson's assessment was wrong requires that we consider a different backdrop for this story, a status quo in which the man claiming to be chief actually was the more powerful figure or in which the Europeans required permission from more than one chief to establish their trading houses. Alternatively, the Europeans might also have arrived in the midst of a power struggle that rendered the scope of the Chiefs' respective authorities unclear.

There are more reasons to trust Radisson's reporting and analysis than to distrust them. His narrative of the events of 1682-84 was at least in part a self-serving account to confirm his renewed loyalties to the HBC and underscore his accomplishments for the Company, thereby securing his importance to it in future. This aim might have affected his writing style, but it would not have affected his judgment and actions during the events he described. Radisson was one of the most knowledgeable traders in North America, with many years of experience in Indian country, including periods of adoption and captivity among the Iroquois.³⁶ His nephew Chouart also had many years of experience in Indian country. If any European traders could distinguish an Indian chief on sight, whether by comportment, clothing, or other distinguishing marks, it would probably have been these two. Thus, in spite of a well-earned reputation for hyperbole

³⁶ For a recent biography of Radisson, see Martin Fournier, *Pierre-Esprit Radisson: Merchant Adventurer, 1636-1710* (Sillery, QC: Septentrion, 2002).

and a healthy ego, Radisson was likely to have understood the political dynamics of his new acquaintances and was among the most able narrators of this era.³⁷

The reliability of narrators is always questionable, however, even when we deal with someone as knowledgeable as Radisson. Their limitations are particularly apparent when we begin to probe the extent of their knowledge. Radisson may have understood how to greet and make alliances with Algonquian peoples such as the Swampy Cree of the Hudson Bay lowlands. And he quite probably understood the qualifications of a chief, along with the privileges and obligations of this office. However, he could not have known the lay of the land with respect to rivalries and disputes between the nations of the lowland Cree and others. When he wrote his narrative, he had not been in the region long enough to discover these dynamics. What he knew of these matters would have come from the Hayes River Cree, a group that had already tied its trading future to him and vice versa. There is no neutral informant, or any final answer to historiographic questions of continuity: did the Europeans create new rivalries among the Cree and new leaders to lead them, or did their arrival simply reignite old fires? On these issues, the record is silent.

³⁷ Radisson's hyperbole — he once infamously described himself and Des Groseilliers as "caesars" — has prompted historians to consider him untrustworthy. However, Germaine Warkentin explains that his style reflects the language of the court more than it does the overbearing ego often attributed to him. She also notes that hyperbole is less apparent in the accounts of his voyages from the 1680s — the source for this tale — which are written in a plainer style, aimed at the needs of merchants. Warkentin, "Discovering Radisson: A Renaissance Adventurer between Two Worlds" in Jennifer Brown and Elizabeth Vibert, eds., *Reading Beyond Words: Contexts for Native History* (Peterborough, ON: Broadview Press, 1996) 43.

2. Red Chiefs, Blue Chiefs: HBC Trading Captains, Cree Chiefs, and Symbols of Authority

Radisson clearly had a good understanding of his indigenous trading partners and knew how to work in their country. This knowledge and skill was highly valued in the fur trade, as the ability to know and be respected by indigenous traders meant stronger relationships and, ultimately, more furs. But not every trader had Radisson's know-how. Some HBC traders were better than others at knowing and working with their Indian trading partners. Over time, some of the individual wisdom was consolidated through the institutional practices of the HBC, but the success of individual traders applying these practices remained variable.

One such company practice was the appointment of trading captains. During the first century of its presence in North America, the HBC stayed firmly planted on the coast of Hudson Bay. Most of the furs it acquired were brought to it by Plains Cree and other inland peoples who made an annual or biennial trek down the rivers in large trading parties. From this fixed geographic position, trading post factors had very little scope to influence inland peoples and their participation in the trade. One of the few tools available to the factors was recognizing trading captains. Bestowed upon the leaders of large trading parties, this recognition nurtured relationships with resourceful and influential (or so the factors hoped) leaders, encouraging them to bring more people, or at least more furs, down to the Hudson Bay coast to trade. Once at the fort, these leaders represented the inland fur producers and members of the trading party in discussions of

price and other dealings with the HBC. Company factors hoped that recognizing a special relationship through the trading captain system would convince their trading partners to remain loyal to them and not do business with the French (and later, Canadian) competition.³⁸

The HBC also depended upon local populations to assist it with hunting and other activities associated with daily subsistence. Local leaders were instrumental in organizing the labour force necessary to undertake bigger seasonal activities, such as the spring and fall goose hunts, and were therefore also recognized as trading captains. The relationships between these local leaders, their kin, and the company often moved beyond such services, becoming close and multi-faceted. They were, as we saw in Radisson's narrative, allies who gave the company permission to be on their land. They were also frequently the fathers of the women who married senior company officers according to the "custom of the country," bringing the officers into their kin networks and fostering more integrated relations between the company and the local peoples.³⁹ In addition, these local leaders also served as HBC ambassadors, greeting leaders from other nations in the course of their seasonal travels and inviting them to the trading post on the company's

³⁸ Regarding the conduct of the trade generally, see Arthur J. Ray and Don Freeman, "*Give Us Good Measure*": *An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto: University of Toronto Press, 1978). Regarding trading captains more specifically, see Morantz, *supra* note 8.

³⁹ See Sylvia van Kirk, "*Many Tender Ties*": *Women in Fur-Trade Society in Western Canada, 1670-1870* (Winnipeg: Watson and Dwyer, 1980); Jennifer Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980); and Heather Rollanson Driscoll, "'A Most Important Chain of Connection': Marriage in the Hudson's Bay Company" in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds., *From Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 81.

behalf. In fostering these relationships, the HBC was also implicated in the enmities and rivalries of these local peoples.

Recognition as a trading captain meant receiving gifts and material symbols of the relationship implied by this status. In a system that quickly became standardized across HBC trading posts, the captains received gifts of tobacco, liquor, food, a special coat that was either red or blue, and other clothing when they arrived at the forts to trade. They received further gifts of tobacco, guns, cloth, and brandy when they left.⁴⁰ Local trading captains received similar gifts at the gathering accompanying the spring goose hunts and at least some tobacco, food, and brandy when they visited the forts at other times. In material terms, these gifts expressed the HBC's rudimentary understanding of the institutions of Cree leadership, the central feature of which was that, except in times of war, Cree leaders maintained their status without coercive force, relying instead on their persuasive abilities, their wisdom, and their generosity.⁴¹ These characteristics signalled the leader's merit as a hunter and diplomat, as someone capable of acquiring wealth. But wealth was valued only as something that would be shared rather than accumulated. The HBC gifts played into the dynamics of Cree leadership, at least as the HBC understood them. The coats served to distinguish a captain's status, whereas the other gifts could be

⁴⁰ Ray and Freeman, *supra* note 38; and Glyndwr Williams, ed., *Andrew Graham's Observations on Hudson's Bay, 1767-91* (London: Hudson's Bay Record Society, 1969) at 317 [Graham's Observations].

⁴¹ See e.g. Graham's Observations, *ibid.* at 169-70; and Captain James Knight's observations in the York Factory Post Journal from 1717 (20 April 1717), Winnipeg, Hudson's Bay Company Archives (HBCA) (B.239/a/3).

distributed among his trading party and his constituency to confirm and maintain it.⁴² By giving the captains tobacco to distribute to other nations upon their departure, HBC factors promoted their ability to demonstrate generosity to other people and nations away from the fort, thereby again reinforcing their status as leaders. The more “productive” trading captains — those who brought more furs to the company — were rewarded with larger quantities of gifts and promises of more to come, again reinforcing their influence among their own people.⁴³

To return to questions of continuity and disruption, the key to understanding the implications of this system for indigenous political forms and governance lies in the manner and scope of its application. First, we must question how well the HBC men knew the Cree communities they dealt with. As in the story of The Bearded, we must consider the scope of our narrators’ knowledge and factor in an appropriate margin of error. For example, one of the best-known observations regarding Cree governance is from the journals of Andrew Graham.⁴⁴ Graham spent approximately twenty-five years on the west coast of Hudson Bay and benefited from the tutelage of James Isham, one of the most respected and successful factors York Factory ever had. Both were known to have taken country wives. But Graham never travelled inland himself, culling his observations from his experience among the local peoples and from other men who had

⁴² Ray and Freeman, *supra* note 38 at 68, remark that, according to a nineteenth-century source, the captains often gave away these coats, along with all the other gifts.

⁴³ *Ibid.* at 69 and 241.

⁴⁴ Graham’s Observations, *supra* note 40.

made the journey into Indian country. And though both Isham and Graham left rudimentary trading vocabularies in Cree and other languages, it is remarkable that no pidgin language, no lingua franca, ever developed through the contact between the HBC and the Swampy Cree or inland peoples. That there was no Chinook of the northwest is indicative of limited contact between trading post factors and their trading partners.⁴⁵ Given these parameters, the development of more than a tourist's acquaintance with the lives and political systems of their indigenous trading partners was very much a matter of individual initiative and skill in getting the required information through other sources.⁴⁶

Second, though most of the HBC's interests aligned with recognizing trading captains who already had a following, the implementation of this strategy depended on the ability of individual factors to identify such persons, a skill that was not universally well developed. As a general rule, the company needed trading captains who had influence over others. Due to this, it sometimes found itself dealing with leaders whom, had circumstances permitted otherwise, it would not normally have chosen for such a role. Daniel Francis and Toby Morantz discuss an example from Richmond Fort (1749-59) on the eastern coast of Hudson Bay whereby "Shewescome, an Indian the postmaster deemed an 'idle lazey fellow,' was maintained as a captain because 'he has so Great a

⁴⁵ Linguist Peter Bakker has noted the possibility that trade proceeded through interpreters and has remarked that "[g]iven that the HBC traded with Natives for such a long period, it is surprising that so few of their employees knew a Native language." Bakker, "Hudson Bay Trader's Cree: A Cree Pidgin?" in John D. Nichols and Arden C. Ogg, eds., *Nikotwâsik iskwâhtêm, pâskihîpayih!: Studies in Honour of H.C. Wolfart* (Winnipeg: Algonquian and Iroquoian Linguistics, 1996) 1 at 4.

⁴⁶ For discussions of the skill set of a trading post factor, see Ray, *supra* note 8; and Foster, *supra* note 8.

Sway over the Natives here I am Obligated to be very kind to him, for what he says is a Law with them.”⁴⁷ On the other hand, there were interests and situational factors, including less knowledgeable and talented HBC officers, which would have led to the appointment of captains who would not otherwise have attained leadership status in their communities.⁴⁸ For example, HBC factors were under pressure from the company to encourage Aboriginal hunters to change their hunting objectives from food to furs, a change the company believed would increase the productivity of its trading posts. Bestowing the title of “captain” and its associated presents was the primary means by which HBC factors could encourage this transition, and it was probably applied indiscriminately by at least some HBC men. Competition with rival French traders was also a significant motivation for recognizing trading captains who were otherwise not recognized as leaders by their communities. Finally, the HBC was not alone in its interest in forming trading captain relationships. Trading captain status was meaningful to the local and trading party leaders in part because it gave them the tools they needed to seek or reinforce their leadership status within their own communities. Consequently, the institution of trading captain presented an opportunity to stake out or expand a leadership role, an opportunity that would appeal as much, if not more, to ambitious or potentially

⁴⁷ Daniel Francis and Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600-1870* (Montreal and Kingston: McGill-Queen’s University Press, 1983) at 44, quoting Fort Richmond Post Journal, HBCA (B.182/a/1:48d). See also Morantz, *supra* note 8 at 490.

⁴⁸ Ethnographer David G. Mandelbaum noted that “[t]he Hudson’s Bay Company disturbed the pattern of chieftainship in some degree”: Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, University of Regina, 1979) at 108.

rebellious individuals as to well established leaders. One need only reflect on the story of The Bearded to consider how this potent mix of colonial and local interests might play out.

In the context of this system of recognition and rewards, and the circle of generosity it created, the line between the recognition of existing Cree leaders and the creation of new ones was easily crossed. Trading captains may or may not have been men who were, or would otherwise become, recognized as leaders in their communities. However, the appointment of leaders who might otherwise not have been recognized as such does not necessarily equate to the subversion or disruption of a whole system of governance and politics. In fact, the HBC's choices of leaders and forms of recognition relied on Cree institutions and practices, and may have in some cases served to reinforce rather than detract from them.⁴⁹ Thus, though it is important to recognize that the institution of trading captain had some impact on leadership in Aboriginal communities and probably had disruptive impacts in specific cases, conclusions that HBC practices caused discontinuities in Cree leadership structures and resulted in "puppet" leaders lacking legitimacy in their own communities are unwarranted, at least on a general level.

In the last quarter of the eighteenth century, the company began to establish trading posts inland, finally engaging its Canadian competitor, the North West Company, directly. With this move the competition between the two trading companies heightened

⁴⁹ As Morantz, *supra* note 8 at 495, notes, "[t]he trading captain system may not have been extraordinary from the perspective of [northern Algonquian] social organization."

until they merged in 1821. Deeply connected to the Company's efforts to outdo its competitors, the practice of recognizing captains fell away after this merger. However, this formal end to the institution of captain did not end the HBC practice of recognizing important leaders and "principal men." In spite of Governor Simpson's best efforts to rationalize the company's practices and cut away all the fat that had accumulated through the years of competition, trading post factors were never able to completely abandon the annual or sometimes semi-annual giving of gifts and special tokens of recognition to the leaders of their trading partners.⁵⁰ The negotiation of the numbered treaties on the prairies thus occurred against this backdrop of long-standing practices of political recognition.

3. The Lessons of History: Revisiting the *Sawridge* Case

The numbered treaties include provisions regarding the distribution of medals and suits of clothing for Indian chiefs and headmen. To a modern reader, these provisions seem archaic and appear to support interpretations of treaty history that portray the Indians as victims who gave away their land for trinkets. However, if we keep in mind the events of the early 1680s in the York Factory region and the HBC practice of recognizing trading captains, the historic significance of these provisions comes into focus. Rather than demonstrating victimhood, they take their place in a long history of recognition in which the newcomers acknowledged Cree and other Aboriginal leaders

⁵⁰ Arthur Ray notes that in spite of Simpson's intended reforms, trading practices "in the parkland area ... remained largely unchanged and at best the company managed to trim the excesses": Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974) at 196.

through gifts, coats, and symbolic gestures.⁵¹ It was a process that influenced and disrupted local politics, including the selection of particular leaders in some cases, but that certainly did not supplant the political modalities underlying the recognition of those leaders.

If we take this longer view in revisiting the excerpts from the Treaty 6 record cited in the *Sawridge* judgment, the Plains Cree request for the Dominion government to establish their chiefships is still troubling but less mysterious. The Treaty 6 context included the collapse of the buffalo herds.⁵² The conditions of scarcity rendered special relationships with the Company, or its more recently arrived American competitors, more important than ever since these relationships were a medium through which indigenous peoples accessed relief and support for hunting and trapping from the European traders. In these conditions, the Plains Cree who asked that their “chiefships be established by the Government” undoubtedly did not mean to imply that they had no system of government, but rather that they would like the Dominion government to regulate the destructive forces wrought by the combination of American competition in the fur trade and scarcity on a scale never before experienced. They understood that the interests created by these conditions had the potential to splinter their communities, but such comprehension cannot

⁵¹ See Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A Documentary History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen’s University Press, 2000) at c. 1.

⁵² See Taylor, *supra* note 4.

be equated with the disappearance of a system of governance as a *fait accompli*. And yet, this is precisely the conclusion drawn by Justice Muldoon in the *Sawridge* decision.

Muldoon's literal interpretation of the Plains Cree request is also problematic on a number of other fronts. Drawing on the interpretive lessons from Radisson's narrative of events in the early 1680s, we can query whether Muldoon treated Reverend McDougall's report with sufficient appreciation of the factors that shaped and limited McDougall's vision. Little probing is required to conclude that he does not. For one, Justice Muldoon's conclusions assume that all Plains Cree were looking for colonial recognition and assistance in sorting out internal leadership problems. He does not consider who made the requests relayed by Reverend McDougall, or on whose behalf they were voiced. Digging just a bit deeper into the record confirms that taking this request as representative of the views of all or even most of the Plains Cree is problematic. A consideration of the whole report submitted by Reverend McDougall reveals that the group of Cree who asked the government to establish their chiefships was primarily composed of people whom the Reverend considered moderate, reasonable in their demands, and inclined to cooperate with the government's designs. For example, McDougall expressed relief that the troublemaker Big Bear — the famous Plains Cree Chief who resisted the treaty until 1882 and was jailed for his part in the Northwest Resistance of 1885 — and his followers were a "very small minority" in this larger group.⁵³ In his report, he further marginalized Big

⁵³ Morris, *supra* note 5 at 174.

Bear's influence by describing him as "a Saulteaux, trying to take the lead in their [the Plains Cree] council," a statement presuming that Big Bear's non-Cree ethnic origins diminished his legitimacy as a Cree leader.⁵⁴ Although this assumption certainly reveals McDougall's views on the subject, it provides no insight into the institutions of leadership as understood by the Cree themselves.⁵⁵

Like Radisson's assertions regarding the Hayes River leader's importance and the correctness of his own decision to deal with him, McDougall's attempts to downplay the significance of Big Bear's influence demonstrate his eagerness to establish the success of his mission and to please Lieutenant-Governor Morris. But, simply probing the record regarding his motives and bringing a longer history of colonial relations and ethnographic sources to bear on his assertions reveals that the Plains Cree held differing opinions concerning the treaties. The request conveyed by Reverend McDougall did not represent the wishes of all Plains Cree, even though a majority did accept the treaty the following year.

⁵⁴ *Ibid.* The "Saulteaux" are known today as the Anishnabe or Ojibway people. Rudy Wiebe notes that in 1874, a year before Reverend McDougall's visit, the Hudson's Bay Company had recorded Big Bear's camp as consisting of sixty-five lodges, or approximately 520 people. By comparison, Sweet Grass, another prominent Plains Cree Chief who was named by the company as "Chief of the Country," had fifty-six lodges. See Wiebe, *Dictionary of Canadian Biography Online*, vol. 11, ed. by John English and Réal Bélanger, s.v. "Mistahimaskwa (Big Bear)," online: Library and Archives Canada <http://www.biographi.ca/>.

⁵⁵ See Binnema, *supra* note 11, who comments that, among the peoples of the northwestern plains, no necessary correspondence existed between ethnic groups/cultural units and social, political, and economic units; and Susan R. Sharrock, "Crees, Cree-Assiniboines, and Assiniboines: Interethnic Social Organization on the Far Northern Plains" (1974) 21:2 *Ethnohistory* 95, who remarks that plains bands were often polyethnic in composition, either Cree-Assiniboiné or Cree-Saulteaux, with fused ethnic identities emerging in the nineteenth century.

Further comments from the Treaty 6 record cited in the *Sawridge* judgment can also be productively revisited at this juncture. The beginning of this chapter quoted Treaty Commissioner Morris' report of the Treaty 6 negotiations. In it, Morris told the Willow Band of the Plains Cree that a chief must have a following of twenty tents in order for the government to deal with him as a chief. In this instruction, we see the old HBC concern that a man possess a certain amount of influence to be recognized as a leader. Contrary to Justice Muldoon's interpretation, however, this concern can be seen as a reflection of the persistence of Cree political institutions rather than a sign of their breakdown. As discussed above, Cree political community and leadership was flexible, decentralized, and held together by non-coercive means. In this system, the influence of a Cree chief varied over his lifetime.⁵⁶ The Cree did not need a numerical definition of chiefhood; the government did. Moreover, the top government negotiators did not come equipped with the wisdom and experience of Radisson, Isham, or Graham that was necessary to understand these institutions of leadership. Morris, for instance, had been a lawyer and parliamentarian in Upper Canada and a judge in Manitoba before his appointment to negotiate the treaties. Although Morris was informed and accompanied by HBC men in the negotiations, his view of Cree political institutions was probably coloured — if not confined — by his background and class. Even if he understood that

⁵⁶ For example, Wiebe, *supra* note 54, notes that Big Bear's influence grew from approximately twelve tents (20 men) in 1862 to sixty-five lodges (520 people) in 1874 and then to 247 people in 1882. The waning of his influence in the latter years was tied to the starvation suffered by his people.

Cree leadership was dynamic and flexible, these characteristics would appear to confirm the inferiority of Cree society and signal the administrative headaches and obstacles involved in bringing order to the “chaos” of the North-West Territories.⁵⁷ To grapple with Aboriginal governance structures, Morris and his successors introduced rigid, distorting means of control such as the Indian Act, but such measures were not present during the fur trade. Morris’ comments thus mark a new era in the influence of the colonists on Aboriginal leadership, not because the underlying desire to identify influential leaders had changed, but because of the new legal tools used to address it.

Lastly, Morris also referred to a request made by a chief for a blue coat. The colour of a coat may seem a trivial matter, but in fact it was a potent signifier. In a section not quoted in the *Sawridge* judgment, Morris reported responding to this request as follows:

The color of your Chief’s coat is perhaps a little thing; red is the color all the Queen’s Chiefs wear. I wear this coat, but it is only worn by those who stand as the Queen’s Councillors; her soldiers and her officers wear red, and all the other Chiefs of the Queen wear the coats we have brought, and the good of this is that when the Chief is seen with his uniform and medal every one knows he is an officer of hers. I should be sorry to see you different from the others, and now that you understand you would not wish it.⁵⁸

As noted above, coats were an important element of the “outfits” that were given to captains upon their arrival at the trading post. Andrew Graham’s report describes the

⁵⁷ See Jean Friesen, *Dictionary of Canadian Biography Online*, vol. 11, ed. by John English and Réal Bélanger, s.v. “Morris, Alexander,” online: Library and Archives Canada <http://www.biographi.ca/>.

⁵⁸ Morris, *supra* note 5 at 226.

coats as being red or blue, but makes no mention of any significance attaching to which colour a captain received. Morris, however, imbues only red coats with the symbolism of the Queen, and in particular, with being an officer of the Queen. Interestingly, his reply was not immediately accepted by the Cree in these negotiations. Instead, a second Cree Chief, known as Kah-mee-yis-too-ways or the Beardy, voiced a similarly worded request for a blue coat: "I want from my brother a suit of clothing in color resembling the sky so that he may be able when he sees me to know me."⁵⁹ To this second request, Morris again responded, "I cannot give the Chief a blue coat: he must accept the red one and he must not suffer so small a matter as the color of the coat to stand between us."⁶⁰

These extracts come from a larger conversation in which relief and assistance with preserving and managing the buffalo were clearly much more pressing concerns for the two Cree Chiefs mentioned here. In the end, both the Beardy and the first Chief, Say-sway-pus, accepted the treaty, indicating a pragmatic willingness to put symbolism aside for the sake of preserving their peoples' livelihoods. Nevertheless, the insistence of the Cree Chiefs and the potential symbolism of coat colour remain unexplained. Did the Cree Chiefs reject the notion of becoming officers of the Queen? Did blue have a particular symbolic meaning for the Willow Cree? Did these Chiefs want to be distinguished from the other Chiefs taking treaty? Or perhaps they sought a particular symbol of the treaty,

⁵⁹ *Ibid.* at 227.

⁶⁰ *Ibid.* at 228.

with the colour of the sky embodying a promise that would satisfy the Beards's insistence that the treaty payment "exist as long as the sun shines and the river runs."⁶¹

As usual, the documentary record presents a number of mysteries that cannot be solved, at least not without assistance from Cree people, ethnographies, and other resources far removed from the documents themselves. However, instead of assuming such mysteries to be trivial matters, thereby dismissing their importance to our understanding of history and the treaties, we should stop and take note. Legal traditions are full of symbolism, and we miss important signals of political and legal authority when we pass over such details without considering what these strange little notes in the record might reveal. Moreover, we should be skeptical that a narrator such as Morris would catch the meaning of these requests himself.

4. Conclusion

The path travelled in this chapter took us from events around the 1876 negotiation of Treaty 6 to some of the earliest colonial encounters on the west coast of Hudson Bay in the late seventeenth century. The intervening two centuries were very roughly filled in by briefly canvassing the HBC practice of recognizing trading captains during the fur trade. This journey demonstrates that, from day one of the colonial encounter and in varying degrees, Cree political structures have been understood and misunderstood by European newcomers. It demonstrates that continuity will not only be found in the

⁶¹ *Ibid.* at 227.

political institutions of indigenous peoples, but in newcomer confusion as well. This continuity of confusion is itself enough to raise doubts about Justice Muldoon's conclusion that Plains Cree leadership and governance were in disarray by the time of the treaties. Finally, this journey highlights the ambiguities that permeate colonial history and interpretations of Native-newcomer relations. It is this ambiguity that must be carried forward and considered when judicial interpretations of history are poised to determine — and, very often, deny — the rights of Aboriginal peoples.

In the end, the identification of general themes cannot answer questions raised in a particular case. In such cases, attention to ambiguities invites new questions to match every question answered. These questions act as place holders for what we do not, and possibly cannot, know. They serve to remind us that we cannot always distinguish renegade from representative in historical narratives, that we need to factor the incompleteness of our knowledge into the interpretive process and the conclusions we reach, particularly when Aboriginal rights are implicated. Without this approach, our knowledge of indigenous history is as incomplete as the documentary record and as insecure as a house of cards, waiting for someone to ask the question that blows it all down.

Chapter 3: “Thou Wilt Not Die of Hunger ... for I Bring Thee Merchandise” Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763*

1. Striking A Bargain Along the Hayes River

In the summer of 1683, Jean Baptiste Chouart was in charge of a fledgling French trading house located on the west coast of Hudson Bay near the mouth of the Hayes River.¹ A seasoned trader following in the footsteps of his father, Médard Chouart Des Grosseilliers, and uncle, Pierre Esprit Radisson, Chouart needed to protect vulnerable French commercial and colonial interests against English competitors who were also trying to gain a foothold in the region. For both the English and the French, advancing their interests meant establishing good relations with the local Cree. Thus, when a group of Cree from New Severn River passed near Chouart’s fort that summer, he greeted them with tobacco and welcomed them to the fort to trade. That these people had already formed a trading relationship with the English at Albany Fort in James Bay only heightened the Frenchmen’s motivation to treat their visitors well.

One of the members of this party left the trading house and returned two days later. The latecomer was also welcomed with tobacco, but his intentions were not

* In Jeremy Webber & Colin Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 77. There have been small editorial changes to this chapter since publication.

¹ Jean Baptiste Chouart, also known as Jean-Baptiste Des Grosseilliers, was the son of Médard Chouart Des Grosseilliers, the famous French explorer who accompanied Pierre Esprit Radisson on his first mission on behalf of the Hudson’s Bay Company in 1667.

friendly. The man claimed to be “chief of all the nations” in the region and complained that Chouart “had failed to give presents to pay for possessing the country [he and the French] inhabited.”² The insult escalated into a scuffle between the two men, attracting the attention of the other New Severn Cree at the fort. Once he had gained the upper hand (by his own report), Chouart was informed that this self-proclaimed chief was an English mole who had been promised gunpowder and other goods if he succeeded in killing the French at the fort. Chouart chose to demonstrate his generosity and permitted all of the New Severn Cree to depart without further incident, but they left on bad terms with the French.³

The consequences of this episode were felt throughout the network of young alliances that was forming in the region, playing into tensions between lowland Cree groups that likely preceded European arrival. Siding with their French allies, the Hayes River Cree were not satisfied to leave the dispute unresolved. They called the New Severn people back to the post for a council and feast to “learn from them the merits of

² Canada, Parliament, “Relation of the Voyage of Pierre Esprit Radisson to the North of America in the Years 1682 and 1683” by Pierre Esprit Radisson in *Sessional Papers*, No. 8a (1896) Note A at 67 [“Voyage”]. See also Martin Fournier, *Pierre-Esprit Radisson: Merchant Adventurer, 1636-1710* (Sillery, QC: Septentrion, 2002) at 258; Victor P. Lytwyn, *Muskegowuck Athinuwick: Original People of the Great Swampy Land* (Winnipeg: University of Manitoba Press, 2002) at 129. Fournier worked from an unpublished manuscript of Radisson’s travel narrative, discovered in 1997 in Windsor Castle.

³ For a more complete treatment of this incident and its implications for discussions of Cree leadership, see Janna Promislow, “One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert’s Land and the North-West Territories” in Hamar Foster, Benjamin L. Berger, and A.R. Buck, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 55 [Chapter 2 of this dissertation].

the case,” but this did not settle matters; instead, the conflict intensified.⁴ The self-proclaimed New Severn chief again found occasion to complain and disparage the French, which so enraged one of the Hayes River Cree that he attacked and killed the man. The Hayes River Cree and their allies then went on to attack the nearby English post, further increasing tensions in the region.

These events left Chouart and his French associates vulnerable to attacks, so Chouart sought the aid and protection of their Hayes River allies over the winter. Assisting the French meant staying near their post, a location that offered only limited winter hunting. It is therefore not surprising that the Hayes River people made some demands of Chouart before they agreed to remain throughout the winter. Specifically, they insisted that he keep them fed, a request to which he readily acceded.⁵

Thirty-four years later, a Hudson’s Bay Company (HBC) official named James Knight faced a similar situation. The *Treaty of Utrecht* (1713) had secured the region to the English, and York Factory, which was downstream from the location of Chouart’s trading house, had become firmly entrenched on the Hayes River. Although hostilities between the French and English in this area were settled, the need for good relations with the local Cree remained constant. Captain Knight, the HBC bayside governor of the day, was making concerted efforts to negotiate with the Hayes River Cree to convince them to

⁴ “Voyage,” *supra* note 2 at 67.

⁵ *Ibid.* at 69. Fournier’s account of the same events is slightly different, most notably leaving out the council between the Hayes River and New Severn River people. See Fournier, *supra* note 2 at 250-51.

cease their long-standing hostilities against the Chipewyan people, with whom Knight wanted to build a trade. The Cree literally stood between the HBC and trade with the Chipewyan, for the latter needed to cross Hayes River Cree territory to reach either York Factory or the more northerly post the HBC intended to build on Churchill River. By 1717, a peace had been brokered but was still fragile. As Knight recorded in the trading post journal, the Cree were “in a Curs’d Ill humour by reason so many Indians dying all this winter and doo think that the makeing of the Peace with the Northern Indians [the Chipewyan] has been the Occasion of it, for they are of the Opinion the Devill must have so many every year[;] if they can but kill their Enemys they may spare themselves.”⁶ Knight knew that, if he could convince the Cree to remain near the factory during the winter, they would not enter Chipewyan territory, and thus he could prevent further killing that would threaten the peace.

In essence, he was facing the same problem that Chouart had encountered. If the Cree stayed near the factory, they would have to alter their winter hunting patterns and locations. This shift would in turn increase the likelihood of food shortages over the winter and thus the probability of deaths, which would simply confirm the Cree belief as articulated by Knight. Like Chouart, Knight found his way out of this problem by promising the Hayes River leader that he would provide relief in the event of illness or famine, an assurance that the leader accepted. As Knight recorded in the trading post

⁶ York Factory Post Journal, Winnipeg, Hudson’s Bay Company Archives [HBCA], B. 239/a/3, (17 April 1717).

journal, the leader was “Resolve[d] to be pretty near the Factory Next Winter that if they [the Hayes River Cree] are in any Likelyhood of being Starvd he can reach to Gett in & Desires that I would Allow him some Relief which If Should fall out so I have Promised he should be Releivd.”⁷

2. Interpreting the Bargain

Over time, the provision of relief to Cree and other Aboriginal peoples who helped supply York Factory became a matter of course and was no longer immediately associated with the safety of the fort or keeping the peace. HBC officers relied on Cree hunters to bring them fresh “country provisions,” for which they paid with trade goods, such as guns, cloth, metal implements, tobacco, and brandy. These people were in turn assisted by the factory when they were ill or otherwise disabled, during the frequently lean months of March and April before game and migratory birds returned to the area, or when famine descended upon their country. By the mid-eighteenth century, however, the *quid pro quo* so obvious in the episodes from 1683 and 1717 is difficult to discern in the records kept by the HBC traders. Instead, frequent descriptions of starvation among their local Indian trading partners appear in the journals and letters HBC traders sent back to their superiors in London for review, with no corresponding references to the services these traders provided. Less than a hundred years after the first engagements between

⁷ *Ibid.* (20 April 1717).

Europeans and Aboriginal peoples, the initial agreements and acts of “consent,” however limited, that allowed these relationships to progress were forgotten, at least by the European half of the equation.

The records sent home by the bayside employees were scripted in part to justify the inventories of supplies they requested. Consequently, statements of need should be read cautiously. These records nevertheless form the basis for the lasting interpretation, by historians as well as contemporaneous historical actors (at least in England), that the local Indian populations were dependent upon HBC trading posts and that the HBC was frequently engaged in acts of charity, benevolence, and relief – that the relationship, in other words, was one of paternalistic care rather than consent, agreement, and mutual obligation. But, as we will see, the evidence, taken as a whole, suggests that something very much more than paternalism was at play – that normative expectations guided the relationships and that those expectations were the product of something like agreement, a mutually determined (if not fully congruent) sense of obligation.

This chapter is an attempt to unpack those relationships and to uncover the normative aspects of exchange on the Hayes River. Relying on the term “normative” to capture the full range of obligations that may arise in non-state environments, it investigates the norms that informed the actions of HBC and Cree participants, the extent to which these norms were shared, and whether they reflected a true “meeting of the minds.”

In the process, it considers what consent might mean and how it might be achieved and sustained between individuals and communities from different normative traditions or, to use Ludwig Wittgenstein's phrase, different "forms of life."⁸ As we will see, the relationship between the parties on the shores of Hudson Bay included moments of express agreement (at least ostensible agreement) nested within a much larger body of normative expectations that originated in the parties' cultures and in their interactions over time, and that were understood and respected with varying degrees of consistency. This chapter examines the genesis, nature, and dynamics of that body of "intersocietal law."

In recent years, a number of scholars have argued that the Canadian law of Aboriginal rights springs from practices adopted in the interaction of European and Aboriginal peoples in northeastern North America during the seventeenth and eighteenth centuries. According to Brian Slattery, for example, "[t]he principal source of the doctrine of aboriginal rights is an ancient body of inter-societal custom that emerged from relations between British colonies and neighbouring Indian nations in eastern North America."⁹ Similarly, Jeremy Webber has suggested that Aboriginal rights result from

⁸ Ludwig Wittgenstein, *Philosophical Investigations*, 2d ed., trans. by G.E.M. Anscombe (Oxford: Blackwell, 1958). For a fuller discussion of Wittgenstein, see Jeremy Webber, "Meanings of Consent" in J Webber and CM Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3 [Webber, "Meanings"].

⁹ Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Canadian Bar Review* 196 at 200. Significantly, Slattery's more recent work emphasizes that Aboriginal rights are identified through principles of recognition and reconciliation. The former refer to the historical rights of indigenous peoples; the latter involve a principled analysis to arrive at the "legal effects of Aboriginal rights in modern times."

“the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience ... They constitute a set of norms that are fundamentally intercommunal, created not by the dictation of one society, but by the interaction of various societies through time.”¹⁰ Other scholars, such as James (Sákéj) Youngblood Henderson, have emphasized the explicit bargaining process involved in treaties to highlight First Nations’ contributions to the Canadian constitutional order.¹¹ Whether via the accumulation of custom and reasoned reflection or the explicit negotiation of a treaty — and this chapter suggests a strong connection between the two processes — these approaches emphasize the agency of indigenous people in their relations with nonindigenous actors and stress the extent to which the resulting norms were created through cross-cultural interaction. The focus on intersocietal law in these accounts is prescriptive as well as historical, suggesting that a similar co-determination is important in moving toward justice in today’s relations.

Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 *Supreme Court Law Review* 595 at 623. Although introducing the forward-looking “principles of reconciliation” into his analysis might temper his earlier statement of historical intersocietal custom as “the principal source of the doctrine of Aboriginal rights,” Slattery confirms the continuing significance of the concept of intersocietal law by stating that “the law of Aboriginal rights is neither entirely English nor Aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities together” (*ibid.* at 596).

¹⁰ Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 *Osgoode Hall Law Journal* 623 at 638. For similar discussions of Aboriginal law as deriving from both indigenous and European legal traditions, see John Borrows, “With or Without You: First Nations Law in Canada” in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 3; Mark D. Walters, “The Morality of Aboriginal Law” (2006) 31 *Queen’s Law Journal* 470.

¹¹ James (Sákéj) Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Saskatchewan Law Review* 329. See also John Borrows, “Ground Rules: Indigenous Treaties in Canada and New Zealand” (2006) 22 *New Zealand Universities Law Review* 188.

The agency implicit in intersocietal law can, however, be taken too far, suggesting that Aboriginal peoples somehow consented to the injustices, dispossession, and assimilation in their colonial experience. Clearly, the impact of power must be factored into our understanding of intersocietal norms. Webber, for example, warns against a rose-tinted view of the process through which intercommunal norms emerged:

[The intercommunal order] was not the product of the parties' unconstrained consent ... Human interaction never occurs in a perfect world, free from the effects of social inequality, and this was especially true of the period of colonization, marked as it was by warfare, the seizure of lands, and the decimation of Aboriginal societies by disease. The intercommunal norms inevitably reflected, to some degree, the relative power of the Aboriginal and non-Aboriginal parties.¹²

If intersocietal norms were formed in the context of such great imbalances of power, one might wonder why scholars want to emphasize that this interaction is a source of today's relationships and rights.¹³ James Tully has addressed this argument in the context of treaties: "Just because a particular practice of consent, such as a treaty with a non-European authority, is surrounded by force and fraud, it does not follow that the practice of treaty making loses its authority."¹⁴ For Tully, emphasizing the consensual foundation of treaty processes in Canadian constitutional history is not about covering up the

¹² Webber, *supra* note 10 at 628.

¹³ For example, in the context of Australia, Bain Attwood argues that the histories produced through and for law tend to obscure its legitimizing role in the colonial enterprise and thus stand in the way of decolonization. Bain Attwood, "The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society" (2004) 2 History Compass 1.

¹⁴ James Tully, "Consent, Hegemony, and Dissent in Treaty Negotiations" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233 at 238 [Tully, "Consent"].

problems of the past. Instead, both the commitment to consent and the awareness of coercion and fraud should inform the agenda of reformed treaty processes in the present. Similarly, in the case of intersocietal norms, the recognition of agency and the realization that coercive forces also shaped the norms should inform a critical engagement with, and correction of, the norms of today.¹⁵

Two other interpretive tendencies associated with intersocietal norms should be considered before embarking on the account of relations at York Factory. First, the existence of functional relationships between the societies can lead one to presume a greater measure of agreement, a more extensive sphere of common understanding and joint determination, than may have existed. Jennifer Brown, a historian who has written about “fur trade society,” emphasizes the partial and incomplete nature of the social sphere of the fur trade, warning that a “misleading degree of uniformity and consensus” exists in phrases such as “the custom of the country” – the idiom used to describe unions between Aboriginal women and European traders and the normative conventions associated with these unions.¹⁶ Brown is identifying an issue that is often encountered in

¹⁵ Walters, *supra* note 10.

¹⁶ Jennifer Brown, “Partial Truths: A Closer Look at Fur Trade Marriage” in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds., *Rupert’s Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 59 at 61. See also the preface to her 1980 book, in which Brown wrote that “[t]he fur trade ... may be conceptualized as a partial or incomplete social sphere.” Jennifer Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980) at xvii.

the description of social norms: a tendency to obscure disagreement and the incomplete scope of social normativity.¹⁷

The tendency to assume comprehensiveness and consensus can also be seen in conceptual models of cultural interaction. One influential model in indigenous-nonindigenous relations has been Richard White's "middle ground," a concept that describes both a particular historical space – the *pays d'en haut* (the upper Great Lakes region during the fur trade era) – and a more generalizable process of colonial cultural interaction.¹⁸ The concept has become so popular that, as Susan Sleeper-Smith observes, "many scholars are guilty of turning every time and place of cultural encounter into a middle ground, transforming the phrase into an elusive metaphor for various forms of compromise."¹⁹ This chapter explores the normative dimensions of indigenous-settler relations outside the *pays d'en haut*, and it does not, then, directly test White's thesis.²⁰ Nevertheless, his conceptualization of cultural accommodation as "a process of mutual and creative misunderstanding" is relevant and helpful.²¹ As White explains, "the central

¹⁷ For a discussion of this tendency in the legal pluralist literature, see Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall Law Journal 167.

¹⁸ Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Regions, 1650-1815* (Cambridge: Cambridge University Press, 1991).

¹⁹ Susan Sleeper-Smith, "The Middle Ground Revisited: Introduction" (2006) 63 William and Mary Quarterly 1 at 4.

²⁰ For a study that engages with White's thesis directly, see Gilles Havard, *Empire et Métissages: Indiens et Français dans le Pays d'en Haut, 1660-1715* (Sillery, Paris: Les Éditions du Septentrion et Presses de l'université de la Paris-Sorbonne, 2003). Havard is critical of White's middle-ground thesis for obscuring the tensions that framed the particular interaction in the *pays d'en haut* and argues that it is unnecessarily limiting as a paradigm of intercultural accommodation.

²¹ Richard White, "Creative Misunderstandings and New Understandings" (2006) 63 William and Mary Quarterly 9 at 9.

and defining aspect of the middle ground was the willingness of those who created it to justify their own actions in terms of what they perceived to be their partner's cultural premises."²² This does not mean that the participants perceived their partner's cultural premises completely or correctly. Instead, the inhabitants of the middle ground "took such congruences as one could find and sorted out their meanings later."²³ Still, historian Daniel Richter has cautioned against "an exclusive stress on the arena in which people from different cultures were able to work with, rather than against each other" because such narratives run "the risk of obscuring the very real conflicts that must remain central to the tale."²⁴

The second interpretive tendency that one should guard against is the assumption that invention was the key dynamic of intersocietal space. Invention is central to White's middle ground, which he describes as a creative interaction "arriv[ing] at some common conception of suitable ways of acting" – a "process of mutual invention."²⁵ This interpretation has its analogue in Canadian law's description of Aboriginal rights as *sui generis*. The courts have used this Latin tag in two ways: as a characterization of the nature and source of the rights, and as a way of describing the Crown-Aboriginal

²² White, *supra* note 17 at 52.

²³ *Ibid.* at 84. For an example of the overstatement emerging from such middle-ground concepts and idioms, see Sidney Haring, who states that "the 'middle ground' of the meeting of European and indigenous legal traditions in North America is a common law that both recognizes legal traditions and incorporates elements of their common understanding into modern Canadian law." Sidney Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 278 [emphasis added].

²⁴ Daniel Richter, "Whose Indian History?" (1993) 50 *William and Mary Quarterly* 379 at 390.

²⁵ White, *supra* note 17 at 50.

relationship.²⁶ These uses are closely related – *sui generis* relationships gave rise to *sui generis* law. Both assume that the encounter gave rise to something new.

But this emphasis on invention can overstate processes of intercultural formation and accommodation at the expense of cultural continuity.²⁷ To illustrate, consider the alternative process that historian Heidi Bohaker invokes: cultural adaptation.²⁸

Adaptation would be found where Aboriginal and European people had sufficiently robust resources within their own normative systems to cope with aspects of the encounter, such as how to do business with new trading partners, how to treat strangers in need of help, and how to deal with strangers who wrong one's person, kin, nation, or things. Adaptation does not preclude the reverberation of real change within both societies as a result of their interaction. Nor does it preclude a creative and vibrant intersocietal space made up of competing and coexisting normative frameworks. But it would direct our attention to continuity in indigenous (and European) norms, alongside or in place of newly minted *sui generis* versions.

It is neither possible nor necessary to determine whether invention or adaptation dominated in the abstract. We need to focus on how norms developed in particular contexts, allowing for complex fragmented colonial interactions, ordered and structured

²⁶ For the former, see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. For the latter, see e.g. *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

²⁷ For related critiques, see Heidi Bohaker, "Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701" (2006) 63 *William and Mary Quarterly* 23; Darlene Johnston, *Litigating Identity: The Challenge of Aboriginality* (LL.M. Thesis, University of Toronto Faculty of Law, Toronto, 2003) at 33-34 [unpublished].

²⁸ Bohaker, *ibid.* at 51.

in a variety of ways. These cautions point to the need for a nuanced exploration of the dynamics of normativity and consent between Aboriginal peoples and European newcomers. In the next section, I turn to the aftermath of the incidents involving Chouart, Captain Knight, and the Hayes River Cree, canvassing the relations, centred around the exchange of food, that developed at York Factory in the early period of the HBC's presence in North America. After setting out the patterns of exchange and the institutions and practices that developed in conjunction with them, I will discuss the normative dimensions of the exchange. I will then return to the general questions of normativity and consent in intersocietal spaces, using the historical material to imbue these concepts with the incompleteness and ambiguity inherent in such spaces.²⁹

3. Hunting, Fishing, and Starving? Local Exchange at York Factory

In both episodes described at the beginning of this chapter, Europeans promised to feed their Hayes River friends in order to enlist their assistance. And in both, it was clear that the Cree understood that staying near the trading establishments meant incurring risks with respect to their sustenance.

²⁹ A note is due on naming. Where possible and appropriate, I have tried to use the specific names of the peoples involved in this story – Hayes River Cree rather than Cree or Aboriginal, English rather than European. However, I have chosen to use geographically defined English names rather than those that people had for themselves or the confusion of variants employed by the HBC. I made this choice for the sake of simplicity and accessibility.

The Cree homelands, which include the mouth of the Hayes River, were in the boggy lowlands around the coast of Hudson Bay.³⁰ Older histories portrayed the Hudson Bay lowlands as uninhabitable and therefore empty before Europeans established their forts there, with Cree peoples from the woodlands visiting the coast only for seasonal goose hunting in the spring and fall.³¹ From these starting assumptions, historians had hypothesized that the trading posts established in the region brought enormous changes to Cree lifestyles. The presence of the posts was assumed to have induced the Cree to stay closer to the coast, thus altering seasonal migration patterns that involved living inland during the winter. The allure of the posts was explained by European technologies such as guns and kettles, which were thought to have quickly rendered indigenous technologies obsolete. The traders' encouragement to the Cree to redirect their efforts from subsistence activities (hunting for food) to producing commercial goods (hunting and trapping for furs) was also thought to have created food shortages, thus fostering Cree dependence on the posts.³² The presumption of dependence in this early work was nicely encapsulated by E.E. Rich, who commented that one of the "permanent features of the Company's trade" was already manifest at Rupert's River in 1673: "[T]he local chief

³⁰ The lowland Cree are defined in contrast to upland Cree, whose homelands were in the forests of shield country. For a detailed description of the extent and nature of the lowland Cree homelands, see Lytwyn, *supra* note 2, c. 1.

³¹ See e.g. Arthur S. Morton, *A History of the Canadian West to 1870-71: Being a History of Rupert's Land (The Hudson's Bay Company Territory) and of the North-West Territory (Including the Pacific Slope)*, 2d ed. (Toronto: University of Toronto Press, 1973 [1939]) at 3 and 32-3, and discussed in Lytwyn, *ibid.* at 27-9.

³² For succinct fur trade historiographies, see Lytwyn, "Introduction," *ibid.*; Michael Payne, "Fur Trade Historiography" in Binnema, Ens, and Macleod, *supra* note 15, 3.

and two friendly Indians came to [Governor] Bayly to beg for subsistence. This was given them, and they were sent fishing. Here already was shown the marked tendency for the Indians to become dependent on the traders.”³³ Rich apparently saw no irony in the fact that Indians who were reduced to begging for “subsistence” were “sent fishing.”

More recent historians have arrived at different interpretations of the impact of the fur trade on the lowland Cree in the early contact period. Victor Lytwyn, for example, introduced archaeological evidence to support his argument that the lowland Cree occupied at least parts of the lowlands year-round before Europeans arrived in the area.³⁴ Lytwyn has also carefully analyzed the number of lowland Cree that became closely tied to the trading post economy, suggesting that only a few of them did so, with most continuing to visit the posts for only occasional employment or relief, at least until the smallpox epidemic of 1782-83.³⁵ Lytwyn’s findings provide a significantly different starting point for understanding the relationship, effectively defeating older hypotheses of rapid changes in Cree lifestyle in response to the presence of the posts. Lytwyn’s work also provides further support for Arthur J. Ray’s suggestion that dependency on the posts developed only after game populations collapsed in the nineteenth century, and Toby

³³ E.E. Rich, *Hudson’s Bay Company, 1670-1870: 1670-1763* (New York: Macmillan, 1960) vol. 1 at 71. For an eighteenth-century account of this interaction, see also John Oldmixon, “The History of Hudson’s Bay” in J.B. Tyrrell, ed., *Documents Relating to the Early History of Hudson Bay* (New York: Greenwood Press, 1968 [1931]) 371 at 383.

³⁴ Lytwyn, *supra* note 2, c. 2.

³⁵ *Ibid.* at 20.

Morantz' thesis that the introduction of the fur trade did not always undermine Indian societies but may in fact have strengthened existing societal tendencies in some cases.³⁶

The negotiations between Chouart, Captain Knight, and the Hayes River Cree add another dimension to the evolving picture of lowland Cree lifestyles and the dynamics of the early encounter on the coast of Hudson Bay. They indicate that the Cree were aware of the potentially dangerous implications that changing their winter hunting migrations might have for their food supplies. The negotiations also call upon contract-like forms of consent as a source of normative expectations around the exchange of food. And these were not the only agreements supporting food exchange, and exchange more generally, between the Cree and European traders along the coast of Hudson Bay.

It is worth considering the negotiations that had occurred earlier, when the French and the English first managed to establish trading settlements in the York Factory region. These were not first encounters between native and newcomer on the scale of Columbus and the Arawak but, rather, a meeting of strangers with some knowledge of the other through trade and kin networks and the legacies of earlier explorers.³⁷ With Radisson and

³⁶ Arthur J. Ray, "Periodic Shortages, Native Welfare and the Hudson's Bay Company, 1670-1930" in Shepard Krech III, ed., *Subarctic Fur Trade: Native Social and Economic Adaptations* (Vancouver: UBC Press, 1984) 1; Toby Morantz, "Old Texts, Old Questions: Another Look at the Issue of Continuity and the Early Fur-Trade Period" (1992) 58 *Canadian Historical Review* 166 at 167-68.

³⁷ For the Cree, prior exposure to European trade goods and knowledge of European habits would have been acquired through their kin and trade networks with Algonquian peoples from James Bay and the Great Lakes. In addition, the Cree had noticed previous attempts by European explorers Henry Hudson (1610-11), Thomas Button (1612-13), and Jens Munk (1619-20) to explore their part of Hudson Bay; see Lytwyn, *supra* note 2 at 61. The HBC had first attempted to establish a trading post on the Nelson River in 1670, but this mission, led by Radisson and Bayly, failed due to sickness and weather. Rich, *supra* note 32 at 67,

Des Grosseilliers at the helm, the French party was led by experienced, knowledgeable traders with direct knowledge of Algonquian peoples and their forms of diplomacy.

Radisson kept journals in which he described how he put this knowledge to work upon arrival at the Nelson River (called the Bourbon by the French), located in close proximity to the Hayes. From these journals, we know that Radisson made contact with the Hayes River Cree shortly after reaching the region in 1682. He participated in a small gathering during which he and the Cree leaders smoked tobacco and exchanged speeches and gifts. In these ceremonies, Radisson was adopted by the leader as his son. Radisson reported that he made the following speech to the leader just prior to the exchange of gifts:

[T]hy friends shall be my friends, and I have come here to bring thee arms to destroy thine enemies; *thou wilt not die of hunger, nor thy wife nor thy children, for I bring thee merchandise*: take courage, I will be thy son.³⁸

Radisson's words raise many questions. Did he promise to keep his adoptive kin (who would have encompassed the whole Hayes River Cree band) from starving? Or did he promise to sell European goods that would help the Hayes River Cree defeat their enemies and guard against hunger themselves? And, given Radisson's reputation for grandstanding, does this assurance and his report in general overstate his importance to

notes that no Indians had been encountered at Nelson River on this occasion. See also John Oldmixon, *The British Empire in America*, vol. 1 (London: John Nicholson, 1708) at 391.

³⁸ "Voyage," *supra* note 2 at 11-12 [emphasis added]. Radisson reported that the leader responded with "a long harangue" in which he thanked him and assured him that his people would serve him with their lives if necessary.

the Hayes River Cree?³⁹ Such themes recur in the exchange of food that developed over the next half century and will be explored below. Regardless of how one construes this promise, it and the surrounding exchange are notable as original acts of agreement that made future relationships possible.

The gift giving signified that the promises made by Radisson and the Hayes River leader were not merely rhetorical. The significance of gifts among Algonquian peoples was well known to French traders, and later, to their English counterparts as well.⁴⁰ Radisson gave tobacco, pipes, knives, and food to the Cree who had gathered, as well as a blanket and gun to the Hayes River leader to signify his adoption. In return, he received the leader's robe and gifts of pelts and more robes (essentially beaver pelts). Under Algonquian protocols, these acts indicated that the words just spoken were more than intentions: they created obligations. But the nature of the obligations is ambiguous. Were they specific, such as promising relief in the case of famine, or did they simply establish a

³⁹ Germaine Warkentin suggests that Radisson's hyperbole reflects the language of the court, not simply the overbearing ego often attributed to him. Warkentin also notes that the accounts of his voyages from the 1680s – the ones at issue here – are less florid in style; written in a more prosaic manner, they were aimed at the needs of merchants. Germaine Warkentin, "Discovering Radisson: A Renaissance Adventurer between Two Worlds" in Jennifer Brown and Elizabeth Vibert, eds., *Reading beyond Words: Contexts for Native History* (Peterborough: Broadview Press, 1996) 43.

⁴⁰ The significance of presents is often mentioned in the Jesuit Relations. For example, Father Barthélemy Vimont observed, "Presents among these peoples despatch all the affairs of the country. They dry up tears; they appease anger; they open the doors of foreign countries; they deliver prisoners; they bring the dead back to life; one hardly ever speaks or answers, except by presents. That is why, in the harangues, a present passes for a word." Reuben Gold Thwaites, ed., *The Jesuit Relations and Allied Documents*, vol. 22 (New York: Pageant Book, 1959) at 291. The HBC also came to understand that presents were required to broker a peace between nations and to encourage Indians to visit its trading posts, and that certain gifts were a necessary precursor to trade. See E.E. Rich, ed., *Copy-book of Letters Outward &c. Begins 29th May, 1680 Ends 5 July, 1687* (Toronto: Champlain Society, 1948) at 9, 81, 135.

relationship under which the precise obligations might vary? Radisson himself saw gift giving as necessary to create the “great bond of friendship,” and thus he probably viewed his commitments as relational and ongoing.⁴¹ Whatever the content of the agreement, Radisson believed that it included permission for the French to settle in the Hayes River area, in the homelands of his newfound kin.⁴²

The HBC similarly sought permission from the locals when it first arrived. Although no first-hand account of the company’s efforts survives, the HBC’s general instructions to its bayside officials included making “compacts” with the natives to “purchase” their land and rivers, or if this were not an option, at least to secure a “league of friendship and peaceable cohabitation” and the freedom to trade.⁴³ Officials were further instructed to confirm such agreements through ceremonies that would be meaningful to the Natives, and the company suggested that they additionally use “Tallys of wood” to memorialize the date and individuals involved in each “contract.”⁴⁴ The HBC’s efforts to make such compacts were then cited and relied upon in its legal wrangling with the French for possession of the bay over the next decade.⁴⁵

⁴¹ “Voyage,” *supra* note 2 at 11.

⁴² *Ibid.* at 77. See also Lytwyn, *supra* note 2 at 128.

⁴³ Oldmixon, *supra* note 36, summarizes an account of the 1670 voyages of Radisson to the Nelson River and Des Groseilliers to Charles Fort on the Rupert River, which was written by HBC employee Thomas Gorst (who was at Charles Fort). However, his summary sheds no light on the relevant actions of the HBC in the York Factory area. For the HBC instructions, see “Letter to John Nixon” (21 May 1680) in Rich, *supra* note 39 at 9; see also “Letter to John Bridgar” (15 May 1682) in *ibid.* at 36.

⁴⁴ Postscript to “Letter to John Nixon,” *ibid.* at 12-13.

⁴⁵ In answer to a French memorial complaining that the English company was setting up shop on territory that the French king had already possessed for twenty years, the HBC countered the French claim by relying on a “league of Friendship” made by a company official with the “Native Indians” at Rupert River.

Trading protocols that evolved within thirty years of these early moments demonstrate that food became a procedural and symbolic element of trade relationships, with feasts and gifts of food becoming an inextricable aspect of at least some trade.⁴⁶ For example, before the English finally secured York Factory from the French via the *Treaty of Utrecht* in 1713, the latter had enjoyed a ten-year period of relatively stable relations with the Hayes River and undoubtedly other Cree and Assiniboine peoples in the larger area. During this time, trading practices had evolved to include pipe smoking, speeches, gifts of tobacco, and feasts for the leaders, who then shared the food with their followers.⁴⁷ Thus, when Captain Knight took control of York Factory in 1714, he encountered numerous complaints from “Frenchified Indians” who, according to him, had been spoiled by the French.⁴⁸ Knight and his men may not have realized it, but the

In this, the official “firmly purchased both the river it selfe & the Lands there aboute.” The HBC further asserted that the original Rupert River agreement was “repeated and confirmed” by the next company official and that its officials continued to make “solemne compacts and Agreements with the Natives for their Rivers & Territories” wherever they established new settlements. Memorial prepared by James Hayes, undated (probably 1682), in Rich, *supra* note 39 at 70-71. Such claims are repeated in later memorials between the HBC and the French as their struggle for possession of the Hudson Bay coast escalated through the last years of the seventeenth century.

⁴⁶ These protocols have attracted their share of attention from fur trade historians. See e.g. E.E. Rich, “Trade Habits and Economic Motivation among the Indians of North America” (1960) 26 *Canadian Journal of Economics and Political Science* 35; Abraham Rotstein, “Trade and Politics: An Institutional Approach” (1972) 3 *Western Canadian Journal of Anthropology* 1. However, the elaborate protocol most famously described by Andrew Graham (and analyzed by Rotstein) appears to have been primarily associated with the trading Indians – those who travelled from far inland to trade on the coast in the summer months – not the lowland Cree who lived close to the forts.

⁴⁷ “Letters of La Potherie” in Tyrrell, *supra* note 32, 143 at 265-67.

⁴⁸ As quoted in Lytwyn, *supra* note 2 at 73. This comment is from the HBC’s account books. For an account of the negotiations that correspond with this remark, see York Factory Post Journal, HBCA, B. 239/a/3 (17 and 20 April 1717).

demands of the “spoiled” Indians may have been an effort to educate them. For example, in one interaction, Knight reported that the Hayes River leader

is very uneasy and tells me wee are not like the french and that I do not treat them as they did in feasting of [them]; yett they brought a Considerable Present to me and wee had the Ceremony of the Friendly pipe today by reason of y’hott words wee had Yesterday [about] not given ’em brandy, Tobacco, Flower [flour], Indian Corn, & Pease, which I am not in a condition to do.⁴⁹

This passage indicates that feasts and gifts of food were an important part of cementing the relationship between the local Indians and the HBC, quite apart from questions of subsistence and need. It also reveals that, in spite of the relative ignorance of the HBC leadership with respect to the meaning of such gifts, the Hayes River Cree were willing to work at the relationship and were not easily dissuaded by impolitic behaviour on the part of the trading post’s latest occupants.

Once secure in its position at York Factory, the HBC began developing relationships with Aboriginal groups further afield. Inland peoples such as woodland and plains Cree, Assiniboine, and Northern Ojibway – collectively known as the “trading Indians” to the HBC men – were drawn into the trade as “middlemen,” soon supplanting the lowland Cree as the fort’s primary suppliers of furs.⁵⁰ The local exchange around the

⁴⁹ York Factory Post Journal, HBCA, B. 239/a/2 (8 September 1716) [punctuation added]. It should be noted that the late arrival of the HBC supply ship was partially responsible for Knight’s reluctance to host feasts or give the Indians the goods he enumerated. York Factory was short on provisions and other supplies.

⁵⁰ Arthur J. Ray and Don Freeman, *“Give Us Good Measure”: An Economic Analysis of Relations between the Indians and the Hudson’s Bay Company before 1763* (Toronto: University of Toronto Press, 1978) at 41; Daniel Francis and Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600-1870* (Montreal and Kingston: McGill-Queen’s University Press, 1983) at 41.

forts shifted in response to these developments: food and supplies required by York Factory now made up the bulk of it, and the people who participated in it became known as “home Indians.” Most of this trade occurred in the fall, winter, and spring, with the short summer months being dominated by visits from the trading Indians, who travelled from much further away and could do so only during the summer. With these modifications, food became more prominent in the local exchange but nevertheless remained a feature in the protocols surrounding the long-distance traffic in furs.

The exchange encompassed a number of different transactions and relationships. In a detailed study of the lowland Cree and their participation in the early fur trade, Lytwyn suggests that there were two main groups of lowland Cree: the coastal people, who were called the “home Indians” (or “homeguard”), and those who lived inland on the swampy ground, known as “half-home Indians” (or “half-homeguard”).⁵¹ According to Lytwyn, home Indians stayed within 160 kilometres of York Factory and were the most frequent visitors in the winter, whereas half-home Indians ventured further inland and were likely to visit only in late winter to trade their winter catch and participate in the spring goose hunts. Trading post journal entries also occasionally name the Indians as

⁵¹ Lytwyn, *supra* note 2 at 15-18. Lytwyn provides Cree names for the peoples identified by this geographical division. The coastal lowland Cree were known generally as Winnipeg Athinuwick, meaning the “people of the coast,” whereas the inland Cree were the Muchiskewuck (or Muskekowuck) Athinuwick, meaning “people of the swampy ground” (the Swampy Cree). He also identifies several subgroups and Cree names for the Swampy Cree, according to the major river basins in the area.

“Severn” or “Albany,” meaning that they were home Indians at the Albany or Severn posts, which were located to the south of York Factory.⁵²

The spring goose hunt, which will be described in greater detail below, was the most significant part of the local exchange for the provisioning of the fort. The local exchange also included periodic visits over the winter in which Aboriginal traders delivered furs, collected supplies, and brought in fresh meat for which they were paid with brandy and other goods. These traders usually arrived alone or in small groups, having left their families at their wintering grounds or camps within several days’ travel from the factory. Usually greeted with tobacco and a welcoming smoke, they rarely stayed at the fort for more than one night before returning to their families. During these visits, they sometimes picked up dry meat they had stored at the fort.⁵³ The HBC also supported lowland Cree by providing food and relief to those in need, most often the sick, widows and orphans, the injured and the elderly, or others in times of famine.⁵⁴ Finally, the local exchange also encompassed one or two hunters who wintered at the fort with their families, hunting and providing other services for the HBC as needed. Women’s work – snaring and gathering food, and producing goods such as snowshoes – was performed by the wives and daughters of the hunters who stayed near the fort year-round

⁵² It is similarly possible to find occasional references to “Strange Indians” or “Uplanders” arriving at York Factory during the winter months. See e.g. York Factory Post Journal, HBCA, B. 239/a/1 (19 and 20 February 1715).

⁵³ See e.g. York Factory Post Journal, HBCA, B. 239/a/18 (20 March 1736).

⁵⁴ The numbers who sought relief at the fort varied greatly from year to year, with few regularly requiring it until the smallpox epidemics of the late eighteenth century. Lytwyn, *supra* note 2 at 20.

but also by “custom of the country” wives of HBC officers; it was an essential part of this aspect of the local exchange. Sylvia Van Kirk writes that most of the women who became the country wives of HBC officers were daughters of home Indian leaders, which indicates that the HBC also came to understand that kin relations, such as those sought by Radisson with the Hayes River Cree, were critical in the development of its trading networks and alliances in the region.⁵⁵

The picture that emerges is that a minority of home Indians became integrated into the factory’s economy, whereas others had infrequent contact and a limited role in its provisioning and trade. Participants in both of these local exchange networks were involved in the fall and spring goose hunts, which produced several hundred to several thousand geese each year.⁵⁶

The spring goose hunt was the larger undertaking of the two. Well before the mid-eighteenth century, it had already become an important event in the relationship between the factory and the local populations. Its significance was evident in the pre-hunt

⁵⁵ See Sylvia Van Kirk, “‘The Custom of the Country’: An Examination of Fur Trade Marriage Practices” in Lewis H. Thomas, ed., *Essays on Western History* (Edmonton: University of Alberta Press, 1976) 47 at 50.

⁵⁶ Lytwyn (*supra* note 2 at 242, n. 38) estimates that the spring and fall goose hunts brought in up to five thousand birds. He notes that the fall hunt was actually more important, given the unreliability of other food sources, such as caribou, that accompanied the onset of winter, but the spring hunt received the most attention in the journals and other writings left by HBC traders. Providing an example of consumption levels, Lytwyn (*ibid.* at 146, 147) indicates that, from 1727 to 1728, HBC employees at York Factory consumed an average of 126 geese per man, for a total of 3,023 geese. Some of these were eaten fresh, but most were salted and preserved to supply the fort with food throughout the year. See also Dale Russell, “The Effects of the Spring Goose Hunt on the Crees in the Vicinity of York Factory and Churchill River in the 1700s” in Jim Freedman and Jerome H. Barkow, eds., *Proceedings of the Second Congress, Canadian Ethnology Society*, vol. 2 (Ottawa: National Museums of Canada, 1975) 423.

protocols.⁵⁷ Home Indian leaders, whose status resembled that of the men who had negotiated with Chouart and Knight, organized and encouraged families to return to the fort in the spring for the hunt.⁵⁸ Early eighteenth-century English historian John Oldmixon recorded that these leaders, known as *okimah*, played an important role as “Speech-maker to the *English*; as also in their own grave Debates, when they meet every Spring and Fall, to settle the Disposition of their Quarters for Hunting, Fowling, and Fishing.”⁵⁹ The lowland Cree leaders’ role in this regard was aided by gifts from the factor at York, such as tobacco, brandy, and other goods, much of which we can assume was dispersed among those who had gathered, given that redistribution of wealth was a key factor in the ability to attain and retain a leadership position in Cree society.⁶⁰ These goose hunt captains also received special coats and cloth to distinguish their rank. The evidence, at least from Albany Fort, indicates that many goose hunt captains retained their status and were recognized by HBC traders well beyond their productive hunting

⁵⁷ This section on goose hunting is drawn largely from Lytwyn, *ibid.* at 137-47.

⁵⁸ The nature of the local leaders who became involved with the HBC and whether their status was “genuine” or “legitimate” in their communities or acquired primarily through HBC influence are complicated matters deserving a much longer discussion than is possible here. See Toby Morantz, “Northern Algonquian Concepts of Status and Leadership Reviewed: A Case Study of the Eighteenth-Century Trading Captain System” (1982) 19 *Canadian Review of Sociology and Anthropology* 482.

⁵⁹ Oldmixon, *supra* note 32 at 382 [emphasis in original]. Oldmixon was writing specifically about Cree who lived in the vicinity of Rupert’s River, located at the bottom of James Bay. See also Francis and Morantz, *supra* note 49 at 45.

⁶⁰ For more on leadership in historical Cree societies, see Morantz, *supra* note 57; David G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, University of Regina, 1979). For a trader’s comments on the nature of leadership among his trading partners, see Glyndwr Williams, ed., *Andrew Graham’s Observations on Hudson’s Bay, 1767-91* (London: Hudson’s Bay Record Society, 1969) at 170. For a twentieth-century ethnography of the role of the goose hunt “boss,” see Brian Craik, “The Formation of a Goose Hunting Strategy and the Politics of the Hunting Group” in Freedman and Barkow, *supra* note 55, 450.

years, suggesting that such recognition was significant to HBC–lowland Cree relations, regardless of, or in addition to, any role these leaders had in organizing the goose hunts.⁶¹ The protocols that preceded the goose hunt were thus similar to those that accompanied the summer visits of the trading Indians to York Factory as well as those employed by Radisson when he first arrived in the area. Their symbolism and rhetoric were associated with the annual renewal of friendly relations between Aboriginal and European traders.⁶²

The families that assembled – on average, twenty-four families between 1728 and 1760 – camped around the factory and waited for the geese to return to the coast.⁶³ During this time, the HBC supported them with food as necessary and hosted a pre-hunt feast, distributing oatmeal, peas, salted fish, and tobacco.⁶⁴ Brandy was also an important part of this celebration; by the 1730s, a gift of brandy for the first goose killed was

⁶¹ Lytwyn, *supra* note 2 at 18-19; Francis and Morantz, *supra* note 49 at 44. It is worth noting that the home Indian captains also served the factory in an ambassadorial role, carrying messages and gifts of tobacco to other Aboriginal groups to encourage them to come to the factory to trade.

⁶² See Rotstein and Rich, both *supra* note 45 (trade protocols akin to renewal of formal political alliances); Ray and Freeman, *supra* note 49, c. 15 (trade protocols akin to business courtesies). Various traders recorded their opinions: for James Isham's comments on the significance of pipe smoking and ceremonies, see E.E. Rich, ed., *James Isham's Observations on Hudsons Bay, 1743 and Notes and Observations on a Book Entitled "A Voyage to Hudson Bay" in the Dobbs Galley, 1749* (Toronto: Champlain Society, 1949) at 84-85; for Andrew Graham, see Williams, *supra* note 59 at 205; for Edward Umfreville, see W. Stewart Wallace, ed., *The Present State of Hudson's Bay by Edward Umfreville* (Toronto: Ryerson Press, 1954) at 31.

⁶³ Based on data presented by Lytwyn, *supra* note 2 at 140-41.

⁶⁴ These HBC feasts were distinct from the feasts and dances held by the lowland Cree away from the factory at the same time of year. The latter – known as Niskisimowin – have been explained by ethnologists as having spiritual significance, honouring the importance of the geese to the lowland Cree and maintaining harmony between the spirit of the birds and their hunters. See David Meyer, "Waterfowl in Cree Ritual – The Goose Dance" in Freedman and Barkow, *supra* note 55, 433. For a trader's account of the goose dance, see Rich, *supra* note 61 at 76-77.

already being described as an “Old Custom.”⁶⁵ The HBC equipped the hunters with guns, powder, and shot, in anticipation of a return in numbers of geese, even if its outlay was not completely recovered in some years.⁶⁶

The goose hunt indicates that a balance of power, or even an imbalance, existed in favour of the Cree, not the utter dependence assumed by early historians. The hunt was the most significant interaction between the factory and the extended network of home Indians in any year, and it was a critical event in securing the company’s food stocks. It furnished the lowland Cree with goods such as guns, hatchets, cloth, and blankets, but also beads, tobacco, and brandy – things once labelled “luxury” items by Ray.⁶⁷ These contrasting receipts indicate that the HBC staff were dependent on these hunters to survive the year, or at least to augment their diets and thereby make the year more tolerable. As historian John Foster comments, “[o]n balance it is probable that the personnel of the Company’s posts were not dependent upon the Home Guard for physical survival. But they would know that in a major way the pleasantness of their stay in Rupert’s Land was dependent upon the Home Guard fulfilling their role in the fur trade.

⁶⁵ Albany Fort Post Journal, HBCA, B.3/a/20, fo. 20 (10 April 1732), as quoted in Lytwyn, *supra* note 2 at 139. Isham’s record of typical conversations between English and Indian also demonstrates the widespread nature of this custom: “E [Englishman] – Why you have Brought the first Goose that’s Kill’d; A [Indian A] – Yes, perhap’s you will give me a Bottle of Brandy; E – Yes, their itt’s [it is].” Rich, *supra* note 61 at 55.

⁶⁶ This practice bears some resemblance to the system of credit that developed – known as “trusting” – whereby lowland Cree traders were outfitted with hunting and trapping supplies in the fall, and then repaid their debts over the course of the winter. HBC men frequently complained about their inability to enforce these debts, as Indians who had been trusted sometimes took their goods to French traders instead, even if they had sufficient goods to deliver to the company. See Francis and Morantz, *supra* note 49 at 51-53.

⁶⁷ Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974) at 85.

Such an understanding would not be lost on the Home Guard either.”⁶⁸ Taking this suggestion further, Dale Russell provocatively suggests that, if the Cree were “dependent” on trade goods for convenience rather than survival, the goose hunt “probably reinforced the Cree’s perception of the situation [that] he, rather than the Europeans, was ‘in control.’”⁶⁹

Several HBC traders reported that, generally, the relationship with home Indians was one of mutual dependence. James Isham’s comments in this regard, recorded in a mid-eighteenth-century manuscript of his “Observations on Hudsons Bay,” are well known: “it’s to be observ’d that those Indians that hunts at Seasons for the forts, can not do without the assistance of the English, any more than the English without them, for the Chief of our Living is this Country’s product.”⁷⁰ Like other later eighteenth-century traders, Arthur Graham emphasized the “degenerate” character of the home Indians due to the high volume of brandy for which they traded, but he nevertheless noted that the provisions they provided were “not inconsiderable.”⁷¹ The relationship has thus come to

⁶⁸ John E. Foster, “The Indian-Trader in the Hudson Bay Fur Trade Tradition” in Freedman and Barkow, *supra* note 55, 571.

⁶⁹ Russell, *supra* note 55 at 432.

⁷⁰ Rich, *supra* note 61 at 78.

⁷¹ Williams, *supra* note 59 at 192 (“the English brandy killing many of the [home Indians] before the young ones grow to maturity. Indeed they are so degenerated as scarcely to be able to endure their native labours, and climate ... We give in return for one buck deer two quarts brandy, for one doe deer one quart ditto”). The published version of Graham’s *Observations* dates from 1791 (although Graham completed different versions and parts of it as early as 1769). His account is based in large part on his experiences as an HBC trader in various positions at Churchill, York, and Severn between 1749 and 1775. See Williams, “Introduction” in *ibid.*

be understood as one of “interdependence,” which home Indians and traders viewed as mutually beneficial and necessary.

This conclusion has eclipsed further investigation of the normative worlds that supported these stable and seemingly well-ordered relationships. Indeed, the normative dimensions are obscured by the more readily available pragmatic and material factors that can explain – at least functionally – the give and take in the local economy. In functional terms, it seems perfectly sensible for the HBC traders to have engaged in this interaction: they needed the provisions, obtaining them on-site was cheaper than importing them from England, and they needed good relations with the local population. Consequently, they followed its customs, such as making feasts and giving gifts of tobacco, to encourage it to supply them with provisions. They were also aware of the potential for starvation in the harsh climate of the Hudson Bay coastline; helping the local population when it was in need made sense, even if HBC management was critical of the expense involved, so that the favour might be reciprocated should the tables turn.

Similarly pragmatic reasons can also explain the lowland Cree participation. For the early historians, the superiority of European technologies, combined with the presumed poverty of the Indians and their resulting dependence upon the trading posts, answered all questions about the home Indians’ motivations for close connection to the posts. However, since it is now well established that economic dependence was a late eighteenth- or early nineteenth-century development, there is a greater need to explain why otherwise self-sufficient Indians became involved. At least some, if not a majority of

home Indians, viewed exchange with the newcomers as desirable and entered into it voluntarily. In addition to economic interests, there were military advantages to be gained through the guns and other goods they obtained, as Radisson's pitch that he came "to bring thee arms to destroy thine enemies" made clear. Moreover, the key role played by local leaders, and the fact that the HBC records do not refer to any problems finding local people with whom to work, indicates that there were perceived, if not real, social and political advantages for cultivating a close relationship with the trading post. In a society in which leadership was non-coercive and earned through material generosity and accomplishment, connection to a potentially powerful ally (as measured by the HBC's wealth and ability to provide advantageous, and later necessary, military technologies) was probably an opportunity to increase and solidify a leader's sphere of influence.⁷²

Such relationships have often been described in the anthropological literature as involving "general" or "balanced reciprocity," terms that have also been applied to lowland Cree society, so that the interactions with HBC traders were said to have been integrated into a pre-existing framework.⁷³ General reciprocity, a concept defined by Marshall Sahlins in the 1970s, can be described as

a kind of give and take characterized by diffuse obligations to help others who may be in need, regardless of the specific balance of account, of how much has been given or received, by whom, in the past. [It can be] contrasted ... with balanced reciprocity, in which every gift anticipates an equivalent return, and

⁷² See generally Morantz, *supra* note 57.

⁷³ See e.g. Ray and Freeman, *supra* note 49 at 58, 243-44.

negative reciprocity, characterized by persistent and underhand attempts to get something for nothing.⁷⁴

General reciprocity fits well with Isham's comments regarding the mutual dependence between the men at the factory and the lowland Cree hunters. It also fits with the provision of relief by the HBC to the lowland Cree who required it. Under a principle of general reciprocity, HBC traders understood that they would be helped in return if they were in need (and, no doubt, they often were).⁷⁵ Other aspects of the local exchange – such as the winter trade of goods for furs with the people whom Lytwyn identified as half-homeguard Indians – are better characterized as “balanced reciprocity.” The types of reciprocity correspond with degrees of closeness in social relations, thus indicating that the people who came to trade during the winter were in a less close relationship with the HBC than those who received relief.⁷⁶

General and balanced reciprocity are descriptive concepts. They can explain the actions of both lowland Cree and HBC traders, ascribing motivations akin to enlightened self-interest in the process. They do little, however, to further the objectives of this chapter, because the explanations are too generalized to reach the normative dimensions to which this discussion aspires. They tell us why the parties had reason to cooperate in

⁷⁴ Tim Ingold, “On the Social Relations of the Hunter-Gatherer Band” in R.B. Lee and Richard Daly, eds., *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) 399 at 400, paraphrasing M. Sahlins, *Stone Age Economics* (London: Tavistock, 1972).

⁷⁵ See Francis and Morantz, *supra* note 49 at 94, for an application of general reciprocity in this manner.

⁷⁶ For an explanation of the connection between reciprocity and the closeness of social relations, see Ingold, *supra* note 73 at 400.

various ways, but they say little about when such obligations arose, their terms, or how they were regulated and enforced. To go beyond these limitations, one must explore how HBC traders and lowland Cree entered relationships that supported a system of general reciprocity and sketch the boundaries and underlying assumptions that kept the relationships vital. What were the “normal” limits of the relationships, and under what conditions would they end or change to support different expectations? Were HBC traders simply responding to the demands of a foreign clientele, or were their own ideas of fairness engaged? If so, how did their attitudes mesh (or not) with those of the lowland Cree? And did the parties develop understandings that were shared across the Cree-HBC divide? To answer these questions, we must take a normative turn.

4. The Language of Intersocietal Normativity

We saw previously that early historians assumed that the lowland Cree became dependent upon HBC charity. This conclusion stemmed from a literal interpretation of the references to “Starving or Starv’d Indians” in trading post journals and letters to the company in London. These instances were indeed frequent, but what is remarkable is that, as in the quotation from E.E. Rich above, they are often juxtaposed with references to hunting, fishing, trading, and even the provision of food by these and other Indians, so that the fort appears as a nexus of exchange that includes Cree provision, as well as consumption, of food. For example, in March 1715, Captain Knight recorded the following events in the trading post journal:

- Mar 1 – In the Afternoon came here 7 Indians Starvd & gave A Sad Relation of Sev'll others in the Like Conditions when they parted with them [about] 3 Months Ago[.]
- Mar 7 – [2 Indian Boys from this group went up river with 4 HBC men to mend a hedge and look for deer, and another Indian went up the river with 3 of his family, also looking for deer.]
- Mar 10 – 6 Indians came from Portnellson River [with] Meat & Furs [which] they traded.
- Mar 11 – [Indians who traded left and took one of the “Starvd” Indians with them.]
- Mar 12 – [2 Indians came from the south] in want of foods & 2 came with one of our Men from the ... Deer hedge. [T]hese Indians ... have been very hard putt to it for they have left some to perish having killed no Deer this Winter. So I fitted our Indian[s] out [with] provisions to go meet [their] familys, who went away by Moon Light ...
- Mar 15 – some Indians came from portnellson & brought some Meat they traded some the rest they gave to y' poor Indians [here][.]
- Mar 16 – [An Indian went out for deer but didn't find any, an Indian came down the river for want of food,] so I gave him some flower & [peas] & he returned to his Family. [An Indian boy came back with no deer, but some other small game and fish.]
- Mar 20 – [2 Indians went upriver and one came back from Norward to say that they had killed 2 deer and that the travelling deer were being kept back by cold weather and they expect plenty once the first great thaw happens.]
- Mar 22 – y'Indian y' went to meet the Starvd ffamilys; 12 ... came here & Says there was 2 More left to perish Since the First Indians came here & that he now left the indians he came from in a Misserable Condition & has Slept 2 Nights since so I fitted other Indians [with] Necessarys to go meet them in the Afternoon 5 Indians came from portnellson[.]
- Mar 23 – [The Indians that came yesterday traded their skins and went away and 3 Indians went to meet the starved gang].⁷⁷

Given that Knight understood his trading partners well and recorded their reports and information faithfully, these accounts clearly indicate hardship and famine among a number of the Indians in the late winter of 1715. Indeed, famine conditions were common

⁷⁷ York Factory Post Journal, HBCA, B. 239/a/1 (March 1715) (author's paraphrasing in square brackets).

near the trading post in March and April of each year.⁷⁸ But the records are equally clear that other Indians, travelling to the factory from other wintering spots, had food. These entries also portray the factory as a meeting point for different kin groups of lowland Cree, at which they would share provisions and information, and then go to meet others who were potentially in need. The entries indicate that aid and provisions flowed between Indians, not solely from the HBC to them.⁷⁹

These journal entries use “starving” in a manner that obviously refers to physical need. Elsewhere in the record, however, the word appears to have been employed in a more idiomatic way, indicating something other than a physical condition. For example, in a section of his “Observations” titled “Indian’s Coming in the Winter to Trade & C.,” Isham recorded the following as a typical conversation between HBC and Cree traders:

A [Indian] – I am hungary
B [Indian] – I am starv’d no Deer to be got
E [Englishman] – There is tobacco & pipes smoak
A & B – than’k you
...
E – there is some bread & Burgue
A – thank you freind
...

⁷⁸ See, for example, the following comment by Isham: “These Natives are ofte’n starv’d and in Want of food, Especialy in the winter season that Keeps by the Sea side, but upland Indians are Seldom put to these shifts, – having plentier of Beast of all sortts, then what is to be Gott by the sea shore.” Rich, *supra* note 61 at 80-81. Also, consider the Hayes River Indians’ negotiations with Chouart and Knight, and the awareness of the potential for famine shown in their demands.

⁷⁹ This flow of assistance between Indians still seemed to be functioning in 1743 when York Factory Chief Factor Thomas White made the following journal entry, noting that help from the factory was an option of last resort: “[An Indian and family arrived for relief because he was sick and lame all winter] & had it not been for y’assistance of other Indians, he must have perisht but they going further of[f] to look for beaver & he not being able to travel obligd him to Come to y’ factory for reliefe.” York Factory Post Journal HBCA, B. 239/a/25 (17 December 1743).

E – there is tobacco for Indians to smook if you see any
A – Very well
B – Ill be in at the Breaking up of the Rivers.⁸⁰

In this conversation, “I am hungry” is the first thing said by the prototypical Indian trader. The impression is that he greeted the factor by announcing an expectation that he be fed. Adding to this impression is Isham’s record of the phonetic Cree version of this statement: “Yo! Sucky Enwemittsun una.” Here, “Yo!” appears to be a colloquial exclamation, which may be comparable to the modern English “Hi.”⁸¹

This conversation indicates that at least some expressions of hunger – in Isham’s view, the typical ones in the context of trade – do not appear to be limited to a physical state and instead form part of a ritual greeting between home or half-home Indians and HBC traders during the winter. Mary Black-Rogers reached similar conclusions in her study of the use of the word “starving” in HBC records. Noting that it was often employed in conjunction with words such as “begging” and “pity,” and relying on her knowledge of Ojibway culture, she posited the following:

⁸⁰ Rich, *supra* note 61 at 63-64.

⁸¹ This is speculation on my part, as I have been unable to find a similar word in dictionaries such as E.A. Watkins, *A Dictionary of the Cree Language as Spoken by the Indians of the Hudson’s Bay Company Territories* (London: Society for Promoting Christian Knowledge, 1865). Watkins, however, does list the word “Yohoo!” as an exclamation meaning “What now!” (at 459). Nor have I found the word that Isham translated as hungry – enwemittsun – in any Cree dictionary (regardless of dialect). Watkins’ words for hunger/hungry include the verbs *nóot’ākutatootum* (he hungers for it), *sewutāo* (he is hungry, he feels his stomach empty), *kowākutāo* (starving through hunger), and *sekuchew* (starving through cold), all of which relate to the physical condition of hunger and none of which indicate a root similar to the word reported by Isham. Linguist Peter Bakker has described Isham’s Cree as intelligible but also as an ungrammatical mix of several dialects, which may be part of the difficulty. Peter Bakker, “Hudson Bay Trader’s Cree: A Cree Pidgin?” in John D. Nichols and Arden C. Ogg, eds., *Nikotwāsik iskwāhtēm, pāsikihtēpayih! Studies in Honour of H.C. Wolfart* (Winnipeg: Algonquian and Iroquoian Linguistics, 1996) 1 at 24, 25.

Was it always a request for food? /STARV-with-pity-attached/ may even have come to function metaphorically as a ritual affirmation or announcement of the current status of the speaker's relationship with the trader – almost as a greeting.⁸²

Black-Rogers found further support for this suggestion in a later journal entry by trader J.D. Cameron at Rainy Lake, regarding his Ojibway trading partners: "Nothing pleases an Indian more than in giving him something to eat immediately on his arrival. It is the grand Etiquette of Politeness amongst themselves."⁸³

The role of food in trading etiquette is further elaborated in letters sent to London by HBC officials. For example, in responding to inquiries from London, Richard Norton, Factor at Churchill Factory in 1738, wrote the following:

And as to the biscuit and prunes mentioned in ... [your letter to me], I am surprised that your honours should be unacquainted with a thing that has been so long standing in the accounts from all your factories in the country, and therefore to satisfy your honours thereof I do humbly assure that there is not an Indian comes to the factory but what expects some biscuit, prunes, a pipe and a pipe of tobacco etc. at their first coming to trade, which is a compliment of so long standing as cannot without danger to your honours' interest be recalled, and on this occasion is the biscuit and prunes your honours make mention of expended.⁸⁴

The precise meaning of this practice remains open to interpretation but can generally be understood as signifying a continuing relationship most commonly designated as

⁸² Mary Black-Rogers, "Varieties of 'Starving': Semantics and Survival in the Subarctic Fur Trade, 1750-1850" (1986) 33 *Ethnohistory* 354 at 369. See also Bruce M. White, "'Give Us a Little Milk': The Social and Cultural Meaning of Gift Giving in the Lake Superior Fur Trade" (1982) 48 *Minnesota History* 60.

⁸³ Rainy Lake (Lac La Pluie) Reports on District, HBCA, B. 105/e/6 fo. 4 (1825), quoted in *ibid.* at 370.

⁸⁴ Richard Norton, "Letter from Richard Norton" (17 August 1738) in K.G. Davies, ed., *Letters from Hudson Bay, 1703-40* (London: Hudson's Bay Record Society, 1965) 252. See also the 8 August 1728 letter from Thomas McCliesh, Factor at York Factory: "I am sorry of our disappointment of prunes, because nothing obliges the native more for they all in general expect as a due debt at first coming a biscuit, some prunes a pipe and piece of tobacco." Davies, *ibid.*, 135.

“friendship,” as indicated by the “thank you friend” uttered by the Indian trader in Isham’s dialogue.

There were, then, multiple meanings attached to the language of hunger and starvation. In the events recounted at the beginning of this chapter, Chouart and Knight both made explicit assurances to provide relief. These were highly specific undertakings, made in exchange for actions required of the Indians. In comparison to the more general representations Radisson made to his new Hayes River allies, in which he promised that, because he brought merchandise, they would not die of hunger, they have the appearance of a specific agreement.

Chouart’s promise may have been a short-term arrangement made with a few people who would help the French deal with the dangers of a single winter, but the scope of Knight’s pledge is less certain. He was trying to broker a lasting peace between the Hayes River and Chipewyan Indians. Interestingly, however, in discussions regarding food just one year later, such a specific agreement was not mentioned. By that time, 1717, Henry Kelsey had taken over the leadership of the fort while Knight went north to establish the company’s post on the Churchill River. In that winter’s trading post journal, Kelsey noted that

The [two] Indians that came yesterday [from the Hayes River Captain] traded and gave me 26 Deer tongues and 20 Beaver tails that were sent by the Captain to me. I sent the [Captain] 3 [gallons of brandy], Pease & as Much Oatmeal with two falhome of Tobacco. Some other Indians returned and said there were no Deer and they are allmost Starv’d, [and] report that the Indians in general are in want of food, eating their doggs and skins, and that one tent has gone to Gov Knight [at

Churchill] for [relief] but the rest would not go because I ordered [them to the] contrary last fall.⁸⁵

A couple of days later, Kelsey recorded that more Indians had arrived; now he had twenty-four people to “maintain.”

In this journal entry, three things are clear: the factory was in regular contact and exchange with the Hayes River Captain, to whom Knight had made his promise; the Captain and his kin had not themselves fallen on hard times that winter; and other Indians, who were “almost Starv’d,” had turned to the factory for support before their condition became a matter of last resort, making clear the consequences of staying close to York Factory in accordance with Knight’s request (and Kelsey’s “order”).⁸⁶ Without an indication of the conversation between the “almost Starv’d” Indians and Kelsey, we cannot discern the basis for their reliance on the post: Were they asserting a demand for relief based on a particular promise given by Knight or Kelsey? Were they seeking help as part of their relationship with the English traders more generally? And a related question, were their actions bound or guided by the Hayes River Captain’s promises? If they were bound by his negotiations with Knight, it seems unlikely that they would so quickly forget a promise upon which they relied in making significant changes to the location of their wintering grounds. And in Kelsey’s ready accommodation of them, it is

⁸⁵ York Factory Post Journal, HBCA, B. 239/a/4 (25 February 1717). This is a paraphrase of the journal entry.

⁸⁶ Kelsey’s “order” that the Indians not go to Churchill might also reflect the HBC need to keep a measure of control over who attended at which trading post for the sake of maintaining adequate supplies, among other reasons. Regardless, the Company was trying to exercise control over the home Indians and affecting their wintering spots to satisfy its own objectives.

apparent that he knew he was obliged to assist the lowland Cree to ensure that they adhered to his “order” to avoid the new Churchill River post. It is nevertheless remarkable that, in Kelsey’s record of these transactions, the express agreement to “maintain” these people had already fallen out of his consciousness or at least was deemed too unimportant to mention to his superiors. A commitment extracted from the Hayes River Cree by Knight had already been reconfigured as a one-sided command.

By Isham’s time in the 1730s and 1740s, the HBC’s memory of any specific promises and corresponding obligations to provide food appears to have disappeared into what had become a regular feature of the relationship with home Indians. In 1738, Isham provided a glimpse of this aspect of the local exchange in a letter responding to queries from the company’s governing committee in London regarding provisions at the factory. In it, he justifies the practice of supporting the home Indians by referring to their mutual dependence:

As to provisions given to starved Indians exclusive of trade, it is oatmeal only, which we had repeated orders to support, and our own preservation is concerned in their’s which falls heaviest upon our hunters, whom we sometimes keep too long for the season in order to hunt for use whereby they are sometimes surprised by the frost before they can reach the winter grounds, so that it would be inhuman not to support them.⁸⁷

This and other statements by Isham reveal his understanding that, for Indians who hunted for the factory, the danger of famine increased due to the impact of this work on their seasonal migrations. His sense of obligation, however, does not appear to spring from the

⁸⁷ Davies, *supra* note 83 at 263.

promise made by Knight or any other part of the initial arrangements made with local populations. Instead, he isolates the practice of giving food from other aspects of the trade, explaining it as rooted in a moral obligation not to let fellow humans starve, particularly when this risk results from work done to support one's own survival.

In this passage, it is also clear that Isham was trying to justify expenses in terms his superiors would comprehend. Thus, he may have had a better understanding of how the local Cree perceived this obligation – whether based on a particular promise or not – than the passage reveals. This possibility is strengthened by the fact that, at some point during his tenure at York Factory, Isham had taken an Indian wife.⁸⁸ Her identity is not known, but she was probably related to the factory's hunters, and therefore the obligation to provide relief may have resonated with Isham as a matter of kinship, regardless of whether it was understood on English or Cree terms. Even if the substance of the exchange is the same, an obligation based on kinship derives from a different order of relationship, suggesting also a different intersocietal space than the symbiotic commercial interdependence evident from a plain reading of Isham's statement. However, given that not all HBC traders were as knowledgeable or connected as Isham, the probability remains high that at least some of them saw the practice of giving relief only as a matter of colonial or Christian obligation toward a poor and uncivilized people.

⁸⁸ The records reveal very little of Isham's private life on Hudson Bay, but he and his Indian wife had a son, Charles Thomas Isham, who was born in 1754 or 1755. For more information on both men, see John English and Réal Bélanger, eds., *Dictionary of Canadian Biography Online* (Toronto: University of Toronto Press, 2000) s.v. "Isham, James," by E.E. Rich, and s.v. "Isham, Charles Thomas," by Jennifer Brown, online: *Dictionary of Canadian Biography Online* <<http://www.biographi.ca/indexe.html>>.

There are fewer clues available to probe lowland Cree understandings of the HBC obligation to provide relief, other than what has already been suggested. Drawing these suggestions together establishes three bases upon which the lowland Cree might have expected relief from the HBC, none of which necessarily excludes the others. First, there were the specific promises discussed above. Reinforced by the practices of later traders, these would have encouraged trust and reliance, which in turn would have allowed the HBC post to become a resource in local Cree trade and support networks. Thus, explicit contract-like obligations might have given seed to general norms and expectations.

Second, the lowland Cree may have expected relief as an element of the company's commitment to them when it first entered into "leagues of friendship" and was allowed to settle in the York Factory region. Here, general expectations would not have grown out of specific commitments: instead, the obligations would have been relational from the outset, though they might still have arisen from express undertakings, like those made by Radisson and Knight. As a source of obligation, "friendship" is similar to the kinship relations established through marriage or adoption. However, the record indicates that, for a majority of lowland Cree, the trading post remained a secondary support to their existing networks. This suggests limits to the scope and closeness of the relationship with the HBC for a large section of the regional indigenous population. Such limits in turn indicate that, even if relationships were the source of the obligation to provide relief for some Cree, it was not necessarily relevant to all lowland Cree or to all who sought relief from the HBC.

Third, the dynamics of status may also have been a source of Cree expectations of relief, for HBC factors presented themselves as the wealthy friends of the lowland Cree. If the factors wished to maintain this rank and their influence among local populations, they were required to share their wealth. Although potentially demonstrative of all three types of obligation, the gifts and pre-hunt feasts that accompanied the annual spring goose hunts illustrate this dynamic. Status as a source of normativity is notable because, unlike the previous two types of obligation, it derives more completely from the normative frameworks of the lowland Cree.

These possibilities – specific promises, kinship/friendship, status, and an interdependent relationship built upon repeated practices – all carry potential for a measure of convergence as well as divergence in the parties’ understanding of the sources and meaning of the normative practice of providing food. The convergence and divergence in the case of status is particularly interesting. Isham’s humanitarian explanation can be connected to the HBC’s status as representing a superior, Christian, society. According to lowland Cree sensibilities, status was earned in ways and for reasons that differed from those of the English: the HBC traders achieved status through generosity and needed to continue to be generous to maintain their standing as respected and important friends. In the conceptual world of the traders, status was hierarchical and unchanging. In the conceptual world of the lowland Cree, it was fluid and dependent upon actions. But in both worlds, the practice of providing provisions and relief reinforced HBC status and founded an obligation to continue. In this example, the

complexity of finding shared meaning in an intersocietal normative realm becomes apparent, with mutually appropriate practices potentially reinforcing distinctive normative perceptions rather than encouraging the growth of a shared foundation. Furthermore, this example highlights the potential for important normative differences to persist in intersocietal spaces even where there are elements of convergence that develop through practices over a long period of time. Returning to the second type of “starvation” that appears in the records – starvation as greeting – we find, at first glance, a strong possibility of shared understandings. The record indicates that several HBC traders clearly knew what was expected of them when an Indian arrived at the factory to trade during the winter. From Isham’s dialogue, to Cameron’s comment that giving food equated with etiquette, to Norton’s remark that it was a “compliment” of long standing, the traders knew that providing some food, and particularly biscuits and prunes (along with a pipe and tobacco), was an essential pre-trade practice without which “friendly relations” would be difficult to maintain. However, how did the traders understand the greeting itself, and what might the Indians have meant by it? From most accounts, it seems that the traders took the practice as a given – as a matter of business and of keeping “their” Indians away from French traders threatening from further inland. It fulfilled their orders to treat the Indians well, “fayre usage” being a golden rule of conduct for HBC staff in the region.⁸⁹ Thus, HBC traders’ adherence to this form of

⁸⁹ See, for example, the London committee’s instructions to Governor Bridgar regarding his conduct at Port

greeting was perhaps only a “when in Rome, do as the Romans do” approach, such that its meaning was limited to the fact of the practice. The protocol acquired a normative dimension for HBC traders because it was how things were done, not because it was understood or respected. And though some of the more experienced and wiser traders probably realized that, in some contexts, the Indians who used this expression were not literally starving, others might have missed this subtlety and would have surmised that their trading partners were truly a miserable lot.

For the lowland Cree, however, the practice carried meanings beyond the obligatory force acquired through repetition. In any society, protocol and etiquette support culturally defined relationships by providing appropriate words and actions to recognize, reinforce, and honour them. Thus, behind the normalcy of the greeting, a particular relationship was being articulated and reinforced. Black-Rogers suggests that the language of starvation, begging, and pity functioned as a self-humbling device, with humbling reinforcing a relationship and asserting associated obligations.⁹⁰ But what was this relationship?

We have already surveyed the use of friendship and/or kinship at the foundation of at least some of the European relationships with the lowland Cree. Regardless of their proper characterization, these relationships were regularly celebrated and renewed

Nelson: “You must bee carefull to carry your Selfe with prudence humanity and justice towards the Natives.” Letter (15 May 1682) in Rich, *supra* note 36 at 36 [emphasis in original]. See also Isham: “I find goode usage and civility agrees well with these Natives, – if they grow obstobilious [obstreperous?], a Little correction, then sweatning makes them pliant.” Rich, *supra* note 61 at 81.

⁹⁰ Black-Rogers, *supra* note 81 at 367-68.

through protocols that accompanied the spring goose hunt, in which feasts figured prominently. These protocols were similar to the ceremonies through which the relationships were first formed in 1682, in which support and prosperity were promised (at least by Radisson). By comparison, the greeting ritual that began with “I’m hungry” (as described by Isham) was a scaled-down affair that featured a quick gift of food and tobacco before the traders got down to business. Nevertheless, the gift of food recalled the symbols of friendship and promises of support from the original and annual ceremonies. By symbolically recalling the foundation of the relationship, the practices may have served to situate the routine trading activities within the framework of that relationship and the commitments it entailed. The normative meaning of the idiom might thus be traced to the terms of the HBC presence in the region, even if the lowland Cree were alone in retaining any memory of those terms.

As we saw earlier, the HBC’s participation in ceremonies was driven largely by pragmatism, aimed at securing its position against the French. After the competing claims of the French and English were resolved, any recollection of the leagues of friendship disappeared from the HBC records: there were no tally-sticks and no recognition of the company’s trading partners’ demands as a condition of its continued presence on Cree land. Given this, and given British attitudes toward the colonial enterprise generally, it seems safe to conclude that the HBC traders’ understanding of the greeting protocols remained pragmatic, perhaps occasionally finding normative resonance within their own moral universe, as, for example, in obligations of hospitality, but no longer related to

their foothold on the coast of Hudson Bay. Thus, the greeting protocols appear to have been close to a bare but still obligatory practice, with meanings remaining distinct.

By contrast, some evidence indicates that lowland Cree memories of the original agreements remained strong (or at least stronger than those of the HBC) and continued to shape their normative expectations. Few recorded situations directly recall or test these foundations, but one incident documenting a breakdown of the trading relationship in the York Factory region allows us to make these interpretive connections.

In 1712, Fort Bourbon (the French name for what became York Factory, still under French control at that time) had suffered interruptions and shortages in supplies due to the wars in Europe. Chief Trader Nicolas Jérémie was therefore reluctant to trade his limited store of dry foods and gunpowder with the local population, wishing “to keep it as a safeguard for my own life and the lives of my men.”⁹¹ In this context, Jérémie sent out a party of his own people to hunt. In his words, these men

camped near a party of natives who were starving and who had no powder ... These natives, considering themselves dared by the reckless way my men were shooting every kind of game, and feasting before their eyes without sharing anything, made a plot to kill them, and seize what they had.

They [the Indians] invited them [the Frenchmen] to a night revel in their cabins. The two Frenchmen went there without any suspicion of the trap which had been laid for them. The other six slept peacefully, supposing themselves to be in perfect safety, and knowing nothing of the treachery plotted against them. When the guests at this dread banquet were going to go back to their camp, the

⁹¹ Nicolas Jérémie, *Twenty Years of York Factory, 1694-1714: Jérémie's Account of Hudson Strait and Bay*, ed. by R. Douglas and J.N. Wallace (Ottawa: Thorburn and Abbott, 1926) at 39.

traitors surrounded them with daggers and big knives in their hands, and stabbed them, unarmed as they were, without a chance for their lives.⁹²

The Indians then killed the others who were asleep nearby and “pillaged” what they could find among the French. One of the French hunters, who survived by feigning death, crawled back to Fort Bourbon to tell Jérémie this tale.

In the fallout from this incident, Jérémie reported that “[t]hese barbarians, hungry for goods, came to Fort Phelipeaux [on the New Severn River] where they found nobody, and everything they came across they plundered and ravaged. Eleven hundred pounds of powder, which I had not time to get taken to Fort Bourbon was carried away by them, and it was all that we had left.”⁹³ Jérémie and his remaining men stayed huddled at the fort for the rest of the winter, sure that these “traitors” would seek them out and attack. But no attack ever materialized. Several years later, the Indians who were involved in this incident came to trade at York Factory while it was under Governor Knight’s command. In a journal entry stressing the importance of keeping the factory well stocked, Knight commented that “after [these Indians] killd [the French] they broke open their warehouse and to show them they did not value their Goods for they broke and tore what they found and throwd and Scattered 7 Barrells of Powder in the Water so that their design by that was to show that they could Live without their Goods and discourage them from comeing

⁹² *Ibid.*

⁹³ *Ibid.* at 40.

here any more.”⁹⁴ Knight’s account contradicts Jérémie’s report that the Indians had taken the remaining French supplies of powder, and in doing so, it reveals that the attack was a message to the French to pack up, go home, and not come back.

The historian E.E. Rich gives these events a pragmatic interpretation, suggesting that the Cree turned against the French due to lack of supplies such as powder and shot, which had caused them to go hungry.⁹⁵ It is true that access to goods lay at the foundation of all these relationships, as Radisson’s original promise makes clear: “thou wilt not die of hunger ... *for I bring thee merchandise.*” But the fact that supplies were destroyed, in an obvious attempt to send a message, suggests that more than hunger was at issue. Lytwyn has said that the killings were more probably motivated by the refusal of the French traders to share food with the lowland Cree.⁹⁶ His interpretation can be taken further. Jérémie’s frequent use of “traitor” in his report indicates that he viewed the Cree as allies, but he may not have understood that, on Cree rather than French terms, he would have been expected to share provisions with the Cree, even when shortages threatened the French livelihood. And his account suggests that the French traders may have violated other Cree norms in their manner of hunting, “shooting every kind of game.”

⁹⁴ York Factory Post Journal, HBCA, B. 239/a/2 (22 August 1716), quoted in Lytwyn, *supra* note 2 at 132.

⁹⁵ Rich, *supra* note 32 at 414.

⁹⁶ Lytwyn, *supra* note 2 at 132.

One thing is evident: the French violated a basic norm of their relationship with this group of Cree, who responded in kind. And although Knight's comments were a self-serving, expense-justifying story intended for his superiors, his fear of a similar fate is tangible. He understood that these Cree took it upon themselves to demonstrate that there were rules the Europeans must obey if they wished to remain friends, living in the Cree homelands.

5. Conclusion

These interactions, and the traces they left in the HBC records, allow us to glimpse the normative practices that shaped relations between Europeans and the lowland Cree on the shores of Hudson Bay. It is not possible, at this remove, to delineate these relationships exactly or to describe the norms of this intersocietal space with absolute precision. Instead, ambiguity is the defining characteristic of the latter – if only because the investigation has been conducted through one-sided accounts of events written several centuries ago. But this study has nevertheless been revealing. It has shown that friendship, kinship, and alliance connected the European traders to particular groups of lowland Cree; that these links were, for the most part, strong and resilient; that they were founded on negotiation, protocol, and exchange, informed to some extent by each party's normative referents; that they were maintained through protocols that evoked the formative agreements; and that the substantial satisfaction of the parties' normative expectations reinforced these relationships by fostering reliance and trust. In particular,

the provision of food was not solely a matter of dependence or charity. Nor was it simply the expression of functional interdependence. It was a key substantive and symbolic ingredient in the normative dimensions of the local exchange. The innumerable acts of sharing, promising, demanding, and giving gifts of food recalled links between local trade and the relationships formed when Europeans first arrived in the York Factory region, anchoring the intersocietal normative space.

From the negotiations in the late seventeenth century to the later dialogues between Isham and Indian traders, one sees individuals, indigenous and nonindigenous, acting as agents in the creation and management of the relationships that defined the intersocietal space. This study shows how they negotiated their grounding in one normative world while engaging in social, political, and economic activities with people who did not share that world. The picture that emerges is of a working intersocietal space in which normative expectations that were shared at the level of practice were not always shared at the level of meaning. This was an intercultural space that fits White's conception of the middle ground as an environment in which "one took the convergences one could find" but with no particular requirement that the meanings behind these convergences were ever sorted out. This persistence of normative difference suggests that the dominant approach was not one of invention during the period studied. Instead, participants adapted to the demands and responses of the other, often with limited insight into the other's normative frame. Their worlds did not merge – Cree worlds did not become normal to HBC traders, and English worlds did not become normal to the Cree –

although the extent of integration and mutual understanding varied from individual to individual, depending on experience and insight.

In spite of dynamics that maintained different normative worlds, appropriate practices and parallel sensibilities allowed intersocietal obligations to grow, supporting relations in which divergent meanings were, perhaps, a defining characteristic. Working from a point of limited understanding, HBC traders – the more precariously positioned of the parties – were careful to conform to the expectations of their trading partners. With some traders, the possibility of a common meaning was undoubtedly closer at hand, but with others, the possibility was remote. What is clear is that, even if normative understanding was achieved on the ground, only the bare practices or practices explainable in European terms became institutionalized and shared with company bosses and colonial masters across the Atlantic. And the impoverished and one-sided understandings of these practices have been perpetuated in both history and policy.

That there was no complete “meeting of the minds” should surprise no one: perfect agreement is, after all, an ideal concept in both law and political theory. However, the fact that relations could continue, governed by practices taken by all parties to be obligatory in the face of fundamentally different premises, is a valuable insight. It reminds us to resist treating intersocietal norms as a comprehensive, positive body of law that crystallized in a “golden age” of Native-newcomer relations. Nor were the norms a hollow shell. Both lowland Cree and HBC traders had expectations and recognized obligations; but these norms and obligations were not understood in the same way,

backed by the same reasons. In the end, this study portrays intersocietal normativity as a space of physical coexistence and normative difference, a space that required active negotiation, adaptation, and renewal to maintain its vitality. Consent was a limited agreement to engage and an ongoing commitment to making the engagement work.⁹⁷

Originally published in a volume committed to exploring consent in a manner that goes beyond unsophisticated notions of a moment of original consent, it is ironic that this chapter examines events that may be as good an approximation of original consent as can be discovered historically in a settler state. The irony, however, is superficial. Although this investigation has identified some early moments of agreement between lowland Cree and French and English traders, it has also demonstrated that the consent contained in those moments is iterative, thin, and incomplete. The more formalized and discrete instances of agreement are stranded and unmeaningful in isolation from their interplay with processes that built trust, maintained relationships, and created conditions in which working agreements, not strictly dictated by the balance of power, might be achieved. Consent was embedded in the carrying out of protocols (imperfectly understood) and the substantive fulfillment of past agreements and promises, a view that echoes Jeremy Webber's observation that consent may be a process or project that can intensify or atrophy over time.⁹⁸ Moreover, this interplay anticipates and grounds the characterization

⁹⁷ Note the similarity of this idea to relational forms of consent, as discussed by Jeremy Webber, "Meanings", *supra* note 8. In particular, consent in these relationships occurs between people (and peoples) who remain distinct and who need not reach a deep level of agreement to work together.

⁹⁸ *Ibid.*

of treaties as ongoing relationships, which, as James Tully emphasizes, are negotiated in a “much broader *field* of consent and dissent, and a much broader range of *practices* of consent and dissent.”⁹⁹ These observations are significant for scholars and advocates who seek to ground the sovereignty of settler societies in the consent of indigenous parties.

⁹⁹ Tully, “Consent”, *supra* 14 at 249. For treaties, see e.g. Mark Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall” (2001) 24 Dalhousie Law Journal 75; Borrows, *supra* note 11; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

Chapter 4: “It would only be just”: A Study of Territoriality and Trading Posts Along the Mackenzie River, 1800-1827*

In the early nineteenth century, the British Empire did not have much interest in the Mackenzie River – the Deh Cho as the Dene call it. Until settlers became aware of the area’s oil resources in the early twentieth century, it was known mostly for the Franklin expedition’s ill-fated search for a Northwest Passage. The Great River was transferred to the Dominion of Canada as part of the North-Western Territory in 1870,¹ but it was still some time before settlers frequented the region. In the early period, only fur traders maintained a presence, and British territorial claims to the western sub-arctic ‘bore no relationship whatever to the complex legal and quasi-legal rules that governed’ relations between the indigenous and European traders on the ground (Ford 2010: 18).

This chapter presents a case study of the legal and quasi-legal order governing relations along the Deh Cho in the early nineteenth century. It focuses on the establishment of Fort Good Hope by the North West Company (NWC) and later the Hudson’s Bay Company (HBC). The Companies’ negotiations with the Dene about trading post location reveal neglected operative norms of territoriality and governance – on a trading rather than settler frontier. Here, I review the establishment of Fort Good

* In Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (London & New York: Routledge, 2012) 35.

¹ Imperial Order-in-Council admitting Rupert’s Land and the North-Western Territory into the Dominion of Canada, 23 June 1870.

Hope before exploring the normative frameworks of both European and Dene traders. I argue that the European fur traders – whether they realised it or not – worked largely within Dene law and jurisdictions to establish and maintain their presence in the Dene territories. In contrast to the creative misunderstandings and enduring convergences of Richard White’s ‘middle ground’ (White 1991: 52, 84), the intersocietal norms that supported trade at Fort Good Hope were characterized by syncretic adaptations and static misunderstandings that did not significantly alter Dene territorial or governance norms.

These norms cannot be adequately appreciated through western models of territorial governance. Hunter-gatherer societies such as the Dene had distinct territories but without sharp geo-political boundaries; they lived in distinct political communities but land rights or entitlements were not necessarily delimited by membership or territory and their governance institutions were not coercive (e.g. Ingold 1999 and Nadasdy 2002). Indigenous political forms are also obscured by our research materials – largely written accounts recorded by European fur traders and explorers. I therefore use ethnohistorical methods, including ethnographic materials and Dene stories, to bring Dene perspectives and Dene law into sharper view through the distortions of historical records.²

I identify the indigenous traders in the chapter with the names by the English and French record-keepers. This choice has been made out of necessity: Dene political and territorial configurations have shifted over time, rendering a proper delineation of

² For criticisms of ‘upstreaming’ in ethnohistory, see e.g., White 1991: xiv. Contrast White (1999): 109; 116-7; and Clendinnen (2003): 133.

implicated indigenous groups and their territories to their present-day descendants beyond the scope of this study.

1. Fort Good Hope and the Fur Trade in the Mackenzie River District

European traders reached the Mackenzie River at the end of the eighteenth century. NWC traders found the land less rich in furs than they had hoped: significant numbers of beaver pelts – the most lucrative fur – came only from the Liard River region, with less valuable pelts dominating returns from Great Bear Lake and the northern reaches of the Mackenzie (Keith 2001: xii). The remoteness and harsh climate of the region made it difficult to supply. Company traders nevertheless complained about the Indians’ “indolence” and blamed them for the low productivity of the region.

NWC traders were generally well-received in Dene territories. They brought trade goods, such as flints, kettles, and later guns which made Dene lives easier. Other items, such as beads, added to symbolic and decorative materials already used and traded (Krech 1982: 431). Moreover, the footprint of the NWC traders in Dene lands was quite small. Few stayed after they retired, and those that did were often the French or Iroquois *engagés* who had been sent *en derouine*, a practice of spending winters in the camps of the Dene (Brown 1980: Chapter 4).³ Wintering in the Dene camps allowed *engagés* to form close, sometimes familial relations with their indigenous trading partners. Although this practice gave rise to abuses, *engagés* generally helped cement relationships by being

³ For, e.g., Jean-Baptiste Laprise was an *engagé* who appears to have never left the Mackenzie District (Keith 2001: 404-6).

absorbed into Dene society rather than challenging it (see generally Brown 1980: ch 4).

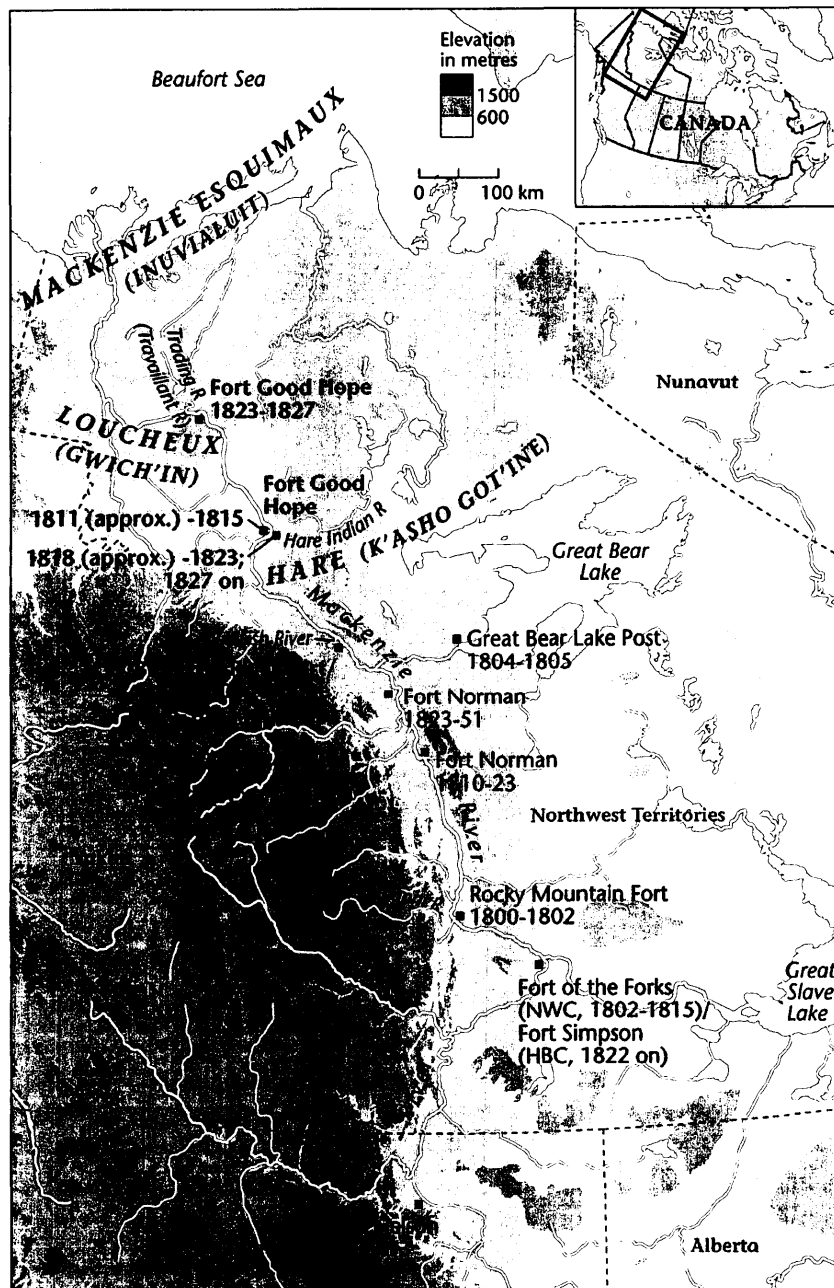
Further, unlike settlers, traders did not threaten Dene access to land and resources.

Disease aside (e.g. Krech 1982: 192), the NWC's appearance along the Deh Cho did not threaten the Dene, their lifestyles, or their lands.

The story of Fort Good Hope begins with the NWC but ends with the HBC. The post was founded in 1806 by Alexander McKenzie, nephew and namesake of the famous explorer. By 1806, the NWC had established trade with the Slavey, Dogrib Indians, and some groups of Hare Indians in the southern parts of the Mackenzie, but had not yet reached the Loucheux, the most northerly Dene people (Keith 2001: 13-18). Fort Good Hope was built to bring the trade to the Loucheux.

Relying heavily on French employees, Indian interpreters, and established Indian friends, McKenzie established contact with the Loucheux at the Trading River in the summer of 1806. He promised to return to establish a trading post there, but broke his first promise within days when he instead established a post more than 100 miles south at Bluefish River.⁴ The Loucheux participated in trade notwithstanding McKenzie's breach of faith; the Bluefish River post was significantly closer to them than any other trading establishment (see Map 3).

⁴ The estimate of distance is based on Shepard Krech's map of the region (Krech 1982: 430).



Map 3: Upper Mackenzie District trading posts, 1800-1827
 Cartographer: Eric Leinberger

Within approximately six years, the trading post was relocated from Bluefish River north to the confluence of the Hare Indian and Mackenzie Rivers, where it was renamed Fort Good Hope (Krech 2003: 190). It was later relocated twice after the NWC merged with the HBC in 1821. In 1823 it moved from the Rapids in Hare territory to around the Trading River in Loucheux territory.⁵ In 1827, it moved back to the Rapids. According to Krech, the 1823 'New' Fort Good Hope was built to make the trade more accessible to the Loucheux, again reflecting the fort's original purpose (Krech 2003: 191). Trading company records about the 1811 and 1823 moves do not exist, but the discussions generated in 1827 provide a rich source for examining the norms governing the establishment of trading relationships and trading posts.

2. Setting Up Shop: Welcoming Strangers Into Dene Lands

McKenzie's 1806 meeting with a group of over 50 Loucheux set the normative stage for the trading relationship that followed (Keith 2001: 240). Trade was preceded by dancing and with the passing of 'a few words' in which the parties shared their concerns and expectations. The Loucheux party expressed concern that McKenzie did not have sufficient trade goods, but McKenzie reassured them he 'had plenty of goods[,] that the only thing they wanted to get [from the Loucheux] was Beaver for which I would give them any of my goods Except my Guns' (*ibid*: 240-1). The Loucheux responded that 'they did not expect to get such valuable articles as that but hoped the Esquimaux would

⁵ The precise location of the post in Loucheux territory is unclear from the trading post records.

not come to attack them while I [McKenzie] was there' (*ibid*). The Loucheux repeatedly expressed concern that Fort Good Hope would, given periodic hostilities between the Loucheux and MacKenzie Esquimaux, fall prey to attacks – perhaps angling to have a trade in guns. McKenzie promised to 'come to the same place next spring,' instructing those gathered 'to have all their peltries & provisions there' and promising 'that if they were able to maintain a fort that they should have one' (*ibid*). To this, the Loucheux responded that 'they were not able to hunt for a fort that they often wanted themselves' (*ibid*).

McKenzie followed fur trading convention by recognizing a trading captain (or chief) from among the Loucheux. Trading leaders were identified by companies for their charisma and, sometimes mistakenly, their influence, in the hope that they would succeed in bringing people – and pelts – to the fort to trade.⁶ Their status was recognized with gifts and protocols that potentially enhanced their position within their own community, particularly if they redistributed the gifts in accordance with leadership norms of generosity found across many hunter-gatherer societies. From the Loucheux, McKenzie chose a man named Yakiban, whom he described as 'the Greatest Raskall amongst them' (Keith 2001: 241).

Customs and ceremonies, such as the recognition of trading chiefs, signalled the norms governing trading relationships. In Cree and Anishnabek territories, for example,

⁶ See Morantz 1982 and Promislow 2008. Regarding the Dene specifically, see Helm 2000: 167-87.

pipe ceremonies established and renewed brotherhood, a status necessary to trading relationships and that potentially entailed other obligations as well (Wallace 1954: 31). Apart from McKenzie's note that an hour of dancing preceded trading, we know little of the ceremonial protocols that accompanied trade between the NWC and the Loucheux. Twentieth-century writers suggest dances were (and are) important events for Dene. Dene drum dances 'commemorate the arrival of important persons to the community and ...acknowledge the return of kinsmen' (Asch 1975: 246). They might also express some ambivalence; Loucheux dances and songs 'honoured the visitors and at the same time expressed a threatening or defiant tone' (Slobodin 1962: 69). In contrast, George Blondin, a Dene elder, explains that '[t]here is such a good feeling at drum dances; everyone is smiling and laughing and they remember they are all one family under the Creator' (Blondin 1997: 60). These contemporary viewpoints suggest that the dance McKenzie witnessed was more important than he imagined. Like the pipe ceremony elsewhere, it celebrated the arrival of the traders and the formation of a trading relationship, but may have also entailed a tension between newfound brotherhood and the otherness of strangers.

The commitments made in the 1806 conversation also illuminate normative expectations of the trading relationship, particularly when contrasted to earlier Hudson Bay trading experiences. In 1682 Pierre Esprit Radisson reported a protocol-rich conversation with the Chief of the local lowland Cree people when he settled the first French trading post along the Hayes River. The Chief reportedly adopted him as kin and

promised loyalty. Radisson responded in kind, forming an alliance that encompassed trade and diplomatic ties tantamount to those expected of a kin network. He also promised the Cree protection against famine, if only by bringing trade goods to their lands. By their mutual promises and gift-exchange, Radisson understood that he and the Cree had both cemented 'the great bond of friendship' and secured permission to build a trading house in the Hayes River peoples' lands (Promislow 2010: 85-6).

In contrast, McKenzie did not promise an alliance to defend the Loucheux. He specifically excluded guns from their exchange, perhaps because the NWC also wanted to trade with the Esquimaux, or perhaps because military alliances were unnecessary in the absence of imperial competition. For whatever reason, the NWC must have been confident that trade in guns was not essential to establishing trading friendships along the Mackenzie River. Unlike Radisson and the Cree, McKenzie and the Loucheux evidently did not commit to mutual support in the necessities of life, notwithstanding the Loucheux's statement that they were 'often wanting.' Instead, McKenzie demanded that the Loucheux return with 'peltries & *provisions*' to support a trading establishment in their lands. From McKenzie's perspective, provisioning was not the two-way obligation of a kin-like alliance; it fell to the Loucheux as part of the commercial exchange. In comparative perspective, the terms of friendship sought by McKenzie look very light.

The Loucheux response suggests that they too sought a limited friendship. The Loucheux stated that they 'were not able to hunt for a fort' and that they 'often wanted themselves.' Read together, it seems that the Loucheux told McKenzie bluntly that they

could not provision a trading post within their midst (Cf Keith 2001: 241, note 113).

Later records from Fort Good Hope also demonstrate the Loucheux preference that the post be self-sustaining, reinforcing the interpretation that the friendship with the new traders did not extend to a shared subsistence. Whether this inability was because their resources were not sufficient, or because they did not have the time, ability, or desire to support outsiders is unknowable.

These conversations demonstrate that traders were welcome, but other incidents indicate that the Dene also expected the NWC to meet certain obligations. From 1807-1815, revenues from the Mackenzie River District declined and the Dene were withdrawing from trade (Keith 2001: 57-8). The war of 1812 and exceptionally cold weather (1810-1821) affected already tenuous supply routes from Montreal, and the NWC's battles with the HBC over its Red River Settlement strained the company's resources even further. Cold weather may also have restricted Dene engagement in trade .

Bad conditions were accompanied by violence: Fort Nelson postmaster Alexander Henry Jr, his family, and four employees were killed by three Dene (Slavey) brothers in winter 1812/13. The NWC abandoned the fort and 'some proposals were made among the Gentlemen Proprietors to retaliate.' However, importantly, the NWC did not pursue vengeance or compensation, nor did it seek the trial of the offenders under common law,

though it knew their identity (Masson 1960, vol. 2: 109).⁷ Indeed, the brothers were received at Fort Liard nine years later as if nothing had happened (Keith 2001: 439). In doing so, they departed from common practice in fur trade country; traders often sought vengeance or compensation from the perpetrators' relatives after such incidents according to indigenous law (Foster 1994 and Reid 1999). Instead local NWC traders identified with indigenous law differently by blaming Henry's ineptitude and supply problems for the violence, perhaps an acknowledgment that the Dene-set terms of the trading relationship had been breached (Masson 1960: 109, 126; Keith 2001: 65).

NWC withdrawal from the District in 1815 was not well-received by the Dene. Wentzel noted that the Company's order to evacuate the district 'was ... done ... to the great hazard of our lives, for the natives having got wind of the move, had formed the design of destroying us on our way out.'⁸ No adverse incidents were recorded, however, and Wentzel reported a warm welcome from the Dene when he led a trading party down the Mackenzie the following year (Keith 2001: 18).

3. Location, Location: Subsistence and Territoriality

Subsistence concerns dominated the conversations around the relocation of Fort Good Hope in the 1823 and 1827, and through them we can glimpse the importance of Dene strategy and normativity to the trading relationship. Securing enough food for the

⁷ The *Canada Jurisdiction Act, 1803* provided for such a trial in Upper or Lower Canada, but see Foster 1990 who argues that this legislation was intended to address European rather than indigenous violence.

⁸ W. F. Wentzel, "Account of Mackenzies River with a Chart From Mr. Wentzel" (Keith 2001: 362).

northern trading posts was a constant concern for the NWC, “due in part to the poor understanding the traders had of the distribution and habits of the animals in particular regions and in part to plain ineptitude. Other problems stemmed from natives not provisioning the posts” (Krech 1982: 432). Clearly, the Loucheux maintained their expectation that the post be self-sufficient, despite company pressure. Further south, NWC representative John Thomson met similar expectations in establishing the Rocky Mountain Fort in the fall of 1800. His choice of location was criticized by Big Chief, the Rocky Mountain trading leader, who told him that:

[They were] not Built in the proper place, as he intended that the Fort should have been further down about half a Days march, at a Much more convenient place where there is a River quite close out of which [the NWC] might take a sufficient quantity of Fish every spring & Fall to feed all hands (Keith 2001: 42).

Krech blamed the failure of the Trading River location on famine conditions and illness amongst the Dene during its brief existence there (Krech 1982: 432). Such complaints were frequent in 1825 and 1826. However, the record also suggests that the Loucheux were disinterested in provisioning the post, whether or not they suffered famine. It seems that three of the trading post’s regular hunters– Capot Blanc, Capot Rouge and Misere – were not Loucheux but Hare Indians, serving the Fort before and after the move into Loucheux territory.⁹ Also, in the lead up to the 1827 relocation back to Hare territory, the Loucheux Chief, Barbue, seemed to sympathise with, and even

⁹ Capot Rouge is identified as Hare on 1 August 1825, HBCA B. 80/a/3. Capot Blanc and Misere are not identified as clearly, but their associations in the trading post record suggest that they were also Hare.

support, the move. When Fort Good Hope Chief Trader Charles Dease raised the issue with him during the summer of 1825, Barbue is reported to have said that “it was the old Chief that asked for its removal and that he would say nothing on the subject but if the Whites starved where they were *it would only be just* that they should build where they could procure a livelihood.”¹⁰

While Barbue’s comments register his distaste for the relocation, they align with the advice that the Rocky Mountain Big Chief and the Loucheux gave NWC traders decades earlier. The Dene consistently indicated that they had limited time, interest, or ability to support both their families and these newcomers. Barbue’s stance may merely have responded to difficult climatic conditions in the 1823-1827 period, or it may have reflected a view that the trading post was not well situated within Loucheux territory. Dease, however, did not report conversations about alternate locations in Loucheux territory, suggesting that Barbue was not overly interested in relocating the post on Loucheux lands.

Barbue’s reference to “justice” also raises a normative aspect of the trading relationship. Sharing was (and remains) a dominant Dene ethic (Blondin 1997: 72), but this did not mean simply sharing food; it meant sharing resources so that one’s family could be self-sufficient. Consequently, denying access to adequate means of self-support would be unfair. Accordingly, the newcomers were expected to be self-sufficient and

¹⁰ Ltr from C Dease to E Smith, 31 August 1825, HBCA B 200/b/a [emphasis added].

were given both permission and information necessary to access provisions. The HBC traders may have missed the normative subtleties of Barbue's response and its re-assertion of the conditions of trader presence first stated to McKenzie twenty years before. Instead, the HBC continued to seek Barbue's agreement to the relocation, reflecting their own normative and pragmatic investment in Loucheux consent, but also attempting to enforce indigenous provisioning commitments as the HBC saw them. As Edward Smith, the Mackenzie District Chief Trader commented, 'we will at least [receive] some benefit from having made the proposal. It will make them more punctual in bringing in Supplies of Provisions.'¹¹

After several more conversations with both Hare and Loucheux, the traders secured the Fort's relocation at a meeting in spring 1827. Both the Little Chief (chief of a Hare band) and Barbue had gathered at Fort Good Hope, representing some but certainly not all of the Hare and Loucheux who frequented the post.¹² Smith invoked Dene notions of fairness when he explained that the Company needed to relocate the fort because of 'the difficulties we Experience in coming this distance twice a year, the risk of their supplies being stopped by the Ice, together with the General Scarcity of Provisions to subsist the people during the long Winter Seasons.'¹³ He encouraged the Loucheux to visit the fort after relocation, offering the same 'reduced prices' to which the Dene in the

¹¹ Ltr from E Smith to C Dease, 3 October 1825, HBCA B 200/b/a.

¹² The Old Chief, mentioned by Barbue, died in January 1826 (Fort Good Hope Trading Post Journal, 27 March 1826, HBCA, B. 80/a/3).

¹³ Fort Good Hope Trading Post Journal, 2 June 1827, HBCA 80/a/6.

more southerly parts of the Mackenzie were accustomed. All in all, Smith's news was well received: 'The Loucheux present consented more readily than I expected they would.....As to the Hare Indians[,] nothing could have given them greater pleasure & they did not conceal their Satisfaction.'¹⁴ The move back to the Rapids followed swiftly after this meeting and trade resumed at the old location by the end of June.

The reasons for Loucheux's consent may not have been solely normative; Barbue's advanced age and illness in 1827 may also have impeded his capacity to act against the move (Krech 2003). The Company's official explanation for the move, meanwhile, was that the Loucheux were afraid of going so close to the Esquimaux, an explanation that seems baseless. No Esquimaux attacks on the Fort were recorded, the Loucheux had guns by this time, and the reported conversations do not mention Esquimaux aggression.¹⁵

The role of Hare and Loucheux relations in facilitating this move were also obscure to the HBC, though their records do signal their significance. When the Loucheux, including Barbue and a party from the lower Loucheux band, visited the fort soon after the move, the Hare greeted them and 'came down to see the Loucheux and have a dance which is their custom of showing a friend by disporition,'¹⁶ This ritual

¹⁴ *Ibid.*

¹⁵ The company position was reported by Governor George Simpson, quoted in Krech from HBCA D 4/92/fo. 29. It probably derived from Sir John Franklin's "unwelcome reception" from the Inuit in 1826 rather than from Loucheux-Inuit relations (Krech 1982: 433).

¹⁶ Fort Good Hope trading post journal, 28 June 1827, HBCA B 80/a/6. Note "disporition" appears to be a version of "disport" meaning to amuse, entertain or divert.

confirmation of Hare and Loucheux friendship facilitated the Loucheux's continued attendance at Fort Good Hope for at least the next 13 years, when the HBC finally established a trading post elsewhere in Loucheux territory.

4. Territoriality and Governance Along the Deh Cho

Reflecting on the importance of subsistence and the nature of inter-Dene relations, we can begin to piece together what the location and relocation of Fort Good Hope tell us about territoriality along the Deh Cho. Territoriality implies some measure of control exercised by a group over a specific region (Elden 2010: 757), a quality not easily discerned from this portrait of the Mackenzie District. In the seventeenth century, Radisson understood the chiefs as exercising authority over the land on which the trading posts were built. By the nineteenth century, in the absence of imperial competition, the NWC traders still sought (and occasionally ignored) the consent and assistance of important men in locating trading posts, but they tended not to secure authorization for their presence on Dene lands. Nineteenth-century trading companies also harboured some territorial aspirations: they sought to carve up the territories they traded in, and to assign particular groups of Indians to particular forts. Traders such as Wentzel mapped approximations of indigenous group territories according to their limited geographical and demographic knowledge (Keith 2001: 74-5). In the 1820s, the HBC governing council listed 'the Indians and freemen considered appertaining to each District

throughout the Country.’¹⁷ Foreshadowing Indian agents’ and treaty commissioners’ lists but lacking the force of colonial law, these maps and lists sought to assign a trading location to each Indian to prevent Indians from evading their debts by travelling to different trading posts year to year. Companies also used gifts to try to instil loyalty, occasionally refused to trade with indigenous traders who attended the “wrong” trading establishment, and tried to influence Dene trading patterns through the institution of the trading chief. Their efforts were thwarted by Indian mobility.

The negotiations about the fort’s location expressed more about Dene territoriality than the traders noticed. Reading trader records with more recent ethnographic studies allows us to read through the information in the traders’ reports. Like the territorial sensibilities of Radisson and later traders, Dene territoriality also involved governance structures, strategies of control, and spatial sensibilities. Dene governance, however, was decentralized and non-coercive; leadership was not confined by strict geo-political boundaries. Moreover, inferring principles of governance from the actions of Dene trading chiefs such as Barbue requires cautious interpretation. Traders may not have correctly identified leaders, their territories, nor understood the leaders’ authority to govern.

At the regional level, it is tempting to describe Dene groups like the Hare and Loucheux as ‘tribes’, but ethnographers such as June Helm warn against it, because these

¹⁷ Ltr from E Smith to M Macpherson, 15 April 1825, HBCA B 200/b/a.

‘regional groups’ lacked governance structures or regular coordination above the band level (Helm 2000: 167-8). Bands, according to Helm, were groups of people who hunted, travelled and camped together, often composed of two or three nuclear families (*ibid*: 169). Chiefs with regional or ‘tribal’ influence emerged only occasionally.¹⁸

Nevertheless, there were clear regional identities amongst the different Dene groups, demarcated by distinct dialects of the Dene language.¹⁹ Within these regional groups, membership was fluid with kin affiliations serving as an “entrée to band units”, but as Helm notes, “[a] kindred has no ‘shape’ or boundaries” (*Ibid*. 168-9). Thus, kin relations may have anchored band membership but kin did not create geopolitical boundaries for the basic (band) or larger (regional group) units of Dene political community. Even without geopolitical boundaries, people and bands still belonged to particular places more than others. Such attachments were evident when Dene hired to hunt for the post deserted the fort or requested leave to return to their lands and families, to their homes.²⁰ They may have had many reasons for leaving the fort – including occasional rough and disrespectful treatment by the NWC or others – but they also had places they needed to be, places strongly associated with their relations and their relations’ seasonal camps.

¹⁸ Helm identifies Akaitcho, a famous Yellowknife who assisted the first Franklin expedition, as a leader with wide influence, but not a ‘tribal leader in any overtly recognized sense’ (Helm 2000: 167-68).

¹⁹ Language and other divisions amongst the people are explained and reflected in various origin stories. See, e.g., the Tlinchodene/Dogrib story – ‘The Mountain Which Melted’ (Petitot 1976: 23).

²⁰ See, e.g., Capot Blanc’s expression of a desire to “go on his own Lands and join his relations,” 26 January 1824 Fort Good Hope Trading Post Journal, HBCA B 80/a/2. See also 18 December 1824, when Le Canard, a young Hare Indian is hired as a hunter but leaves within a few days because he misses his father too much (*ibid*, HBCA B 80/a/3).

The trading post records suggest that boundaries were defined more by the friendship status than by geography. The ceremonial welcome of the Loucheux by the Hare when Fort Good Hope returned to Hare lands in 1827 can be interpreted to support this model of jurisdiction; as can the Loucheux's acceptance of, and assistance to, Hare hunters when the post was located in Loucheux lands. When Dene travelled – for trade or other reasons - they traversed and used resources in what the traders identified as the territories of other regional groups; yet no permissions were required, nor were there adverse consequences so long as friendships were in good standing. It required effort to maintain friendship; it could not be taken for granted. Hostilities between regional groups (other than the Loucheux and Hare), as well with the Inuit, were reported by traders and are confirmed in Dene stories (Blondin 1997: 93, 149).

We can distil Dene spatial sensibilities and relationships from Dene stories that NWC traders Wentzel and George Keith dismissed as fanciful. Dene stories identify special places, particular resources, and where important events took place. The story of The Copper Woman, for example, tells how a Chipewyan Dene woman who lived amongst the Inuit for many years brought copper into Dene lands and situated it at the place where she sank into the earth – a place named in the story as 'Sat in the Same Place Mountain' (Helm 2000: 286-289). Some Dene stories are about particular resources, such as a fishery where the Johnny Hoe River empties into Great Bear Lake. There, elders report that 'the Dogribs would begin building a fish weir from the east side, and the Slaveys from the west. When they met in the middle, they would celebrate with a feast'

(Sahtu 2000: 88).

Embedded in these stories are ethics of sharing resources, respect, and other principles which shaped and reflected Dene territoriality—their moral and legal responsibilities in relation to land, kin, neighbours, and friends. As the Sahtu Heritage Sites and Places Joint Working Group explains in their report,

Traditional place names serve as memory ‘hooks’ on which to hang the cultural fabric of a narrative tradition. In this way, physical geography ordered by named places is transformed into a social landscape where culture and topography are symbolically fused (Sahtu 2000: 21).

Viewing geography as social landscape rather than geopolitical topography enables us to comprehend a territoriality of shared lands and shared authorities. If both the lands upon which the trading posts were located and the trading posts themselves were understood to be shared resources, then the NWC and HBC did not require ‘local authorities’ to sanction a decision about Fort Good Hope’s location. The decision was not a local one, nor were there local authorities attaching to a bounded geopolitical territory. What decision-making authority (or influence), then, would a trading chief such as Barbue have had over the use of the lands to which he and his band were particularly attached?

Chief Sonfrere from Hay River was asked such a question in the early 1970s, when he gave evidence to support Dene’s efforts to register a caveat over 400,000 square miles of land in *Re Paulette et al and Registrar of Land Titles* (1973), 42 DLR (3d) 8 (*Re*

Paulette).²¹ His answers aptly stated the legal principles that were obscured by the historical record. When questioned about various bands' rights to different geographic areas, Chief Sonfrere explained through a translator that

although the boundaries are not written on maps and not drawn out on maps, the people from each community realizes and respects other people's areas; although they are not written, although they are not drawn on maps, they have respect for each other's areas, and he realizes how much the people from Fort Smith use it as well as the people from Fort Providence, but when it comes to helping each other it does not matter, they help each other (trial transcripts from *Re Paulette*: 121-22).

When questioned about whether foreigners would have rights to use his band's area to hunt and fish, he responded 'I personally alone by myself cannot make such a decision. I have to consult other chiefs across the Territories and then we are going to discuss it and reach a decision on that sort of thing' (transcripts from *Re Paulette*: 122). And, finally, when asked about how a group of white people coming into his hunting and trapping area without permission would make him 'feel,' he answered, 'If such a thing is going to occur, they should consult with me, and I will consult with my people and there will be a decision made in such a thing, but they should never just barge in like that' (transcripts from *Re Paulette*: 125).

Consultation and respect were and are the two key principles guiding the Dene in their land and resource use. Under these principles, determining the location of trading posts in the early nineteenth century required consultation with the bands and groups

²¹ Though the Chiefs succeeded in having the Dene interest in land recognized as cognizable at law, their effort to register a caveat failed on appeal: *Paulette v The Queen* (1976), [1977] 2 SCR 628.

affected. Thus, it was not necessarily a problem if traders dealt with individuals who lacked the political authority to grant permission, as Dene norms required these individuals to consult their band and friends about the decision. The trading companies' adherence to the principles of consultation and respect may have been marginal in some cases, but such consultation likely went on between Dene people – such as between Barbue and the Old Chief – regardless of their participation. The NWC and HBC muddled along sufficiently to establish friendships, engage in trade, and, usually, maintain their welcome according to Dene rules.

The relative impermanence of individual traders, the occasional mobility of the forts within Dene territory, and their lack of interest in resources beyond furs and food, would also have been consistent with the territorial and governance principles of their Dene hosts. The traders' practices in the Mackenzie River District did not advance a colonial agenda. They were merchants more than colonists, adding to and adjusting Dene practices to accommodate their trade. They may have changed some Dene norms by recognizing trading leaders and introducing new trade goods, but such change was of limited scope. Many individuals traded outside of the relationships with particular trading leaders and the trading leaders lacked authority to remake Dene territorial authority into the companies' image of jurisdiction. Similarly, the companies were not able to encourage Dene to specialize in a provisions trade, though a few Hare Indians were employed as fort hunters. The normative frame regarding territory and land use – that of sharing resources to support self-sufficiency—remained intact. Territoriality and

governance authority along the Mackenzie River remained firmly on Dene terms in the early nineteenth century.

5. Conclusions

This study confirms much that is already known about colonial claims in settler states: sovereignty was not achieved merely by its assertion and indigenous systems of law and governance remained in place after contact. What this study adds is a closer look at the interaction of indigenous and British legal and quasi-legal rules, particularly about territory and governance authority, in a geographic and political context far removed from settler activity. It demonstrates that in trading contexts, indigenous legal and political systems were not just left intact, but provided the operative norms for indigenous-newcomer relations.

Chapter 5: Treaties in History and Law*

Treaties between the Crown and indigenous peoples are, according to Canadian jurisprudence, historical phenomena. To identify particular treaty rights, the jurisprudence requires us to look for a historical moment of common intention.¹ The primary constitutional significance of the treaty also emanates from this moment. The legal problem is diagnosed as one of empirics; the solution is thus found through historical inquiry. Historians, on the other hand, have taken issue with how courts have interpreted and relied on history in treaty cases.² According to historians, treaty histories are diverse, encompassing both strong and weak relationships, and a spectrum of bargaining positions on the part of both indigenous and Crown parties. Moreover, historians' interpretations of treaties often illuminate only incomplete, tenuous and questionable moments of agreement. With the legal emphasis on common intention and the historical emphasis on context and the rarity or fleeting nature of common intention, the two fields of knowledge and the national narrative they each produce are out of sync.

* Unpublished at time of submission.

¹ *R v Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*]; *R v Marshall*, [1999] 3 SCR 456 [*Marshall*]; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915.

² Arthur J. Ray, *Telling it to the Judge. Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011); J. R. Miller, "History, The Courts and Treaty Policy: Lesson from *Marshall* and *Nisga'a*" in Dan Beavon, Jerry P. White & Paul Maxim, eds., *Aboriginal Policy Research: Setting the Agenda for Change* (Ottawa: Thompson Educational Publishing Inc., 2004) 29 [Miller, "Lessons"]; and William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

Alongside the legal and historical accounts of treaties, numerous indigenous groups, scholars, and public commissions identify treaties as critical to reconciliation, including establishing post- imperial or post-colonial foundations for the Canadian state.³ In their treatments, the negotiated and consensual aspects of historical and modern treaties and related treaty processes are the cornerstone in efforts towards indigenous self-determination and reconciliation between the Crown and indigenous peoples. Those who have signalled the promise of treaties variously describe them as processes of dialogue and recognition, and as a mechanism through which the ideal of a society founded upon consensual relations can be approximated. Whether formulated through the filters of Western political philosophy and history, or through indigenous intellectual and political traditions, advocates conceive treaties as a dynamic, ongoing relationship anchored by shared commitment to that relationship and the attendant mutual recognition and respect.

³ See, e.g., Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem, *Indigenous Difference*]; James Tully, *Strange Multiplicity. Constitutionalism In An Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; John Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22:2 New Zealand Universities Law Review 188 [Borrows, "Ground Rules"]; James [sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241 [Henderson, "Treaty Federalism"]; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [RCAP]; Treaty 7 Elders and Tribal Council, with W. Hildebrandt, D. First Rider and S. Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996) [*Treaty 7*]; Office of the Treaty Commissioner of Saskatchewan, "Statement of Treaty Issues: Treaties as a Bridge to the Future" (October, 1998), online: <http://www.otc.ca/ABOUT_TREATIES/The_Statement_of_Treaty_Issues/> ; Justice Linden, *Report of the Ipperwash Inquiry*, 2007, vol 4, online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_4/pdf/E_Vol_4_Summary_2.pdf> ; Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).

From these perspectives, treaties present both legal and political problems that demand solutions that take the past, present, and future into account.

What bearing should history have on the determination of the legal significance of treaties? What contributions do history and law make towards a politics of treaties capable of achieving their promise? Is it, and why is it, a problem to have different narratives of treaties emerging from law and history? Law, history and political theory all contribute to the national narrative of Canada. Within each of these disciplines ‘official history’ favouring colonial powers has been challenged by greater inclusivity of indigenous and other perspectives, resulting in small shifts that broaden and change that narrative. But these changes are uneven and incomplete, and indigenous perspectives and traditions (which may not manifest the same disciplinary divides) may remain poorly incorporated. This is particularly true in law, which has a privileged place in this inter-disciplinary dialogue. Law calls on history to inform treaty rights decisions and often sets the course for further historical study on indigenous-Crown relations. Law then sets the course for treaty negotiations, setting the parameters of treaty politics even as judges urge the parties to find negotiated solutions. With the coercive force of the state behind it and the role of courts as public authorities, the narrative that emanates from courts has a controlling impact on the public history of treaties. When law, history and political theory collide through the law, the legitimacy and character of the national narrative is at stake.

This paper explores the conceptualizations of treaties in history and law, assessing these conceptualizations against the promise of treaties as well as their influence on each

other. I will argue that the promise of treaties is better served by greater coherence in the conception of treaties between the different fields, and in particular, a conception that takes its lead from the accounts of treaties as defining and constitutive of dynamic relationships. By canvassing treaty histories and survey-style discussions of historical treaties, I will demonstrate that treaty typologies remain largely on colonial terms. I will argue for a re-organization of this schema in favour of one that situates and explains particular treaties in relation to evolving relationships rather than evolving colonial interests. The review of legal accounts of treaties and treaty rights will illustrate doctrinal expectations of a one-dimensional empirical history, and argue for re-situating history within legal analysis towards a more explicitly normative treaty rights jurisprudence. This legal argument is not new, although it is drawn from a more explicitly inter-disciplinary approach and will offer some variation on the prescription with more attention to remedial avenues.⁴ Although the argument is not new, there are new or renewed impetuses for this discussion : consultation and negotiation processes in aboriginal and Canadian public law proliferate;⁵ the death knell sounds frequently for treaty processes

⁴ For related arguments regarding the need to re-consider how history shapes aboriginal and treaty rights, see Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Supreme Ct. L. Rev. 595 [Slattery, "Generative Structure"]; Mark D. Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 Dalhousie Law J. 75 [Walters, "Covenant Chain"]; and John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 258 Supreme Ct. L. Rev.(2d) 351 [Borrows, "(Ab)Originalism"].

⁵ Dwight Newman has suggested that the development of the duty to consult may ultimately impede the development of aboriginal rights doctrines, which define the scope of any duty to consult: *The Duty to Consult. New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2009) at 26-27.

that are taking far too long;⁶ and, implementation problems continue even where modern treaties have been concluded.⁷ These ongoing and new developments give rise to a need for a conceptual map capable of showing the linkages between them and suggesting the path forward.

To arrive at these arguments and outline the connections between the promise of treaties and the understanding of treaties in both history and law, this paper will need to wade through several methodological minefields and debates that have dogged aboriginal rights jurisprudence. Treaty rights (and aboriginal rights more generally) have posed a particular challenge to what constitutes a productive relationship between law and history. Particularly animated in debates surrounding aboriginal title, legal scholars from New Zealand and Australia especially have contested the historical justiciability of aboriginal title, claiming that a properly historicist legal history of the doctrine renders legal arguments about the continuity of aboriginal title in the common law tradition suspect.⁸ Other scholars, particularly from Canada, have viewed the continuity of aboriginal title as a matter of both legal history and legal argument, situating the

⁶ See, e.g., Justine Hunter, "Treaty commissioner suggests shutdown," *The Globe and Mail*, 13 Oct 2011, p. S1; and James M. Lornie, *Final Report with Recommendations regarding the Possibility of Accelerating Negotiations with Common Table First Nations that Are in the BC Treaty Process, and Any Steps Required*, submitted to the Minister of Aboriginal Affairs and Northern Development, 30 November 2011 [Lornie Report].

⁷ See, e.g., *Inuit of Nunavut v Canada (Attorney General)*, 2012 NUCJ 11, 2012 CarswellNun 16 (WL) [Nunavut].

⁸ See, e.g., Paul McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-determination* (Oxford: Oxford University Press, 2004) (the common law doctrine of aboriginal title did not emerge as law until the 1970s); and Mark Hickford, "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837-53" (2010) 38 *The J of Imperial and Commonwealth History* 175.

historical account of aboriginal title within legal discourse and noting that the interpretive parameters of law, as well as disputes about the character of law, are part of the account of its history.⁹ Their respective insistences on the controlling significance of historical versus legal accounts assume different relationships between law and history, and, presumably, different underlying views of what serves the ends of justice or reconciliation (or simply, legal arguments) in the present.

These debates transfer into inter-disciplinary conversations, where the potential for clashes between historical and legal methodologies manifest in historians' discomfort with the interpretive selectivity and finality required of history in aboriginal rights cases and the judicial treatment of the nature of historical knowledge more generally.¹⁰ Further methodological challenges are introduced by indigenous conceptions and methodologies of law and history, which the disciplines of law and history have both struggled to recognize and accommodate.¹¹ And finally, the disciplinary perspective of political

⁹ See, e.g., Mark D. Walters, "Histories of Colonialism, Legality, and Aboriginality" (2007) 57 University of Toronto Law J. 819. Other scholars who have emphasized the legal and historical continuity of aboriginal rights in their work include Kent McNeil, Brian Slattery, and John Borrows.

¹⁰ See citations in *supra* note 2; Alex Reilly & Ann Genovese, "Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence" (2004) 3 Indigenous Law J. 19; and Joel R. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Arguments, and the Philosophy of History" (1993) 51 University of Toronto Faculty of Law Review 80.

¹¹ See, e.g., John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall L. J. 2 [Borrows, "Listening"]; Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20 Canadian J. of Law & Society 123 [Napoleon, "Straightjacket"]; Bruce Granville Miller, *Oral History on Trial. Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) [B Miller, *Oral History*]; Dipesh Chakrabarty, "Reconciliation and Its Historiography: Some Preliminary Thoughts" (2001) 7 UTS Review 6 [Chakrabarty, "Reconciliation and Its Historiography"]; and Miranda Johnson, "Honest Acts and Dangerous Supplements: Indigenous Oral History and Historical Practice in Settler Societies" (2005) 8 Postcolonial Studies 261.

philosophy changes the shape of the debate about the relationship between law and history to focus on the normative weight of history, and historical injustice in particular, in the formulation of present-day legal or constitutional rights, and in democratic politics more generally.¹² Moving between all of these methodologies and disciplinary concerns requires attention to their similarities and contributions to the formation of national narratives.

Grappling with these various disciplines, methodological intersections, and related strands of critique is a vital step in arriving at a more coherent account of treaties. This paper will attempt to move through them one by one, starting on this path by exploring the promise of treaties as drawn from a variety of scholarly accounts of the constitutional significance of treaties. Next, the discussion will turn to history, both to provide some descriptive anchors for the Canadian experience of treaty making as well as to consider the narrative impressions left by treaty histories, with particular emphasis on what I refer to as “survey accounts” that give summary shape the diversity of treaty histories. The final section of the paper will turn to the legal account of treaties, considering the doctrinal history as well as the interpretive principles that guide the

¹² See, e.g., Jeremy Waldron, “The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus” (2006) 11 Otago Law Review 161, and regarding Aboriginal rights more generally, Jeremy Waldron, “Indigeneity: First Peoples and Last Occupancy” (2003) 1 New Zealand J. of Public and International L. 55; Dwight G Newman, “Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title” (2006-2007) 44 Alta. L. Rev 779; Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002); Tully, *Strange Multiplicity*, *supra* note 3; Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford, New York: Oxford University Press, 2008); and James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008), vol 1.

determination of treaty rights. These discussions will close with reflections on judicial approaches to treaties that can better support a coherent national narrative and thus also better support the promise of treaties beyond the courts.

1. The Promise of Treaties: Treaties as Constitutional Narrative

Legal and political theorists, both indigenous and non-indigenous, have looked to a long history of treaty-making in North America to provide alternative constitutional narratives – a mix of legal, moral, and historical story-telling (and argument) aimed at articulating the foundations of a post-imperial constitutional order. In their discussions, the constitutional character of treaties has several overlapping dimensions. First, treaties represent a constitutional event, providing a “credible alternative to the doctrine of discovery as a source of legitimacy for European assertions of sovereignty in North America.”¹³ Second, treaties create a framework for working together within or between political communities, giving rise to descriptions of treaties as relationships and processes. And third, through these frameworks, treaties generate intersocietal (and constitutional) norms and meanings that also guide the conduct of the relationship. In this section I canvass these three constitutional dimensions of the promise of treaties to set the stage for the later discussions of treaties in history and law.

¹³ Macklem, *Indigenous Difference*, *supra* note 3 at 156.

i. Treaties as Constitutional Event

Courts have generally avoided a definitive account of the constitutional event marked by treaties, in part because courts have taken a broad approach to what counts as a treaty and the circumstances and nature of each treaty vary according to time and place. More significantly, the courts have carved out *sui generis* space for Crown-indigenous treaties.¹⁴ This *sui generis* status distinguishes Crown-indigenous treaties from their international law counterparts, thereby avoiding the need to inquire into the sovereign status of the parties required to form treaties under contemporary international law – a status that historically may have been as or more elusive for the Crown than for indigenous parties.¹⁵ Our current law, however, has nineteenth-century starting points in which courts characterized treaties as confirming if not accomplishing the subjection of indigenous peoples to the Crown, and as a distribution of power and protection from the Crown to indigenous peoples. This juridical history will receive more attention in the third section of this paper. At this point in the discussion, however, it is important to raise the doctrinal treatment to contextualize the accounts that will be reviewed below, which

¹⁴ *R v Simon*, [1985] 2 SCR 387 [*Simon*]: “an Indian treaty is an agreement *sui generis* which is neither created nor terminated according to the rules of international law” (at 1037).

¹⁵ In *Sioui*, *supra* note 1, the treaty in issue pre-dated the Royal Proclamation of 1763 and was primarily concerned with peace and alliance between the Huron and the British. The Court commented that “[a]t the time with which we are concerned [Crown] relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.” The *sui generis* approach permitted the Court to avoid difficult issues regarding the status of the Crown’s sovereignty at the time (not yet established, as the Attorney General for Quebec pointed out). It should also be noted that these concerns arise from the present construction of state sovereignty in international law and that the law of nations in the mid-eighteenth century might have evaluated the capacity of indigenous nations differently.

react to the unsatisfactory account of the acquisition and nature of Crown sovereignty in Imperial and Canadian constitutional law.

Alternative accounts of the constitutional events marked by treaties place greater significance on the role of treaties in the acquisition of Crown sovereignty and the formation of the Canadian state. Treaty federalism, advanced by James [Sákéj] Youngblood Henderson and Keira Ladner, is a prominent narrative that emphasizes treaties as the most significant feature of a constitutional theory that is grounded in North American experience.¹⁶ Henderson first presented his treaty federalist argument in 1994 when he argued treaties are the source of the Crown's powers within treaty lands, creating a treaty order in which the treaties are on par with the *Constitution Act, 1867* that divided jurisdiction amongst provincial and federal legislatures.¹⁷ More recently, he has re-asserted his arguments, grounding the pre-treaty environment in indigenous legal

¹⁶ Henderson, "Treaty Federalism", *supra* note 3; Keira Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2d ed (Peterborough, Ont: Broadview Press, 2003) 181. Jean Leclair has pointed out weaknesses in the treaty federalism narrative, and in particular that it fails to bring non-treaty indigenous people (i.e., Métis people and non-status and urban aboriginal people) into the revamped federation for which it advocates: Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2005-2006) 31 Queen's L. J. 521. His view is in part premised on what I would argue is an overly historical understanding of treaties. Some of his concerns may be addressed by the broad view of treaties discussed in this paper. Other concerns raised by Leclair relate to how indigeneity has been constructed by law and policy, resulting in different and uneven access to constitutional protections among indigenous peoples. These topics are beyond the scope of this paper. See generally: John Borrows, "Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 403; Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *ibid*, 223; and Sébastien Grammond, *Identity Captured by Law. Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal-Kingston: McGill-Queen's University Press, 2009).

¹⁷ Henderson, "Treaty Federalism", *ibid*.

regimes by reviewing treaties within indigenous nations or confederacies.¹⁸ He supports the judicial direction towards finding “shared meaning” in interpreting treaty rights and argues for institutional reform and a negotiated implementation of the treaty order. In his view, the potential of treaties to support a postcolonial constitutional order depends “upon a reliance on consensual values and dialogical processes.”¹⁹

Other legal scholars share the essential argument that legitimate foundations for the Canadian state can only be grounded on the consent and participation of indigenous nations obtained through treaties, a view that recognizes the pre-existing sovereignty of indigenous nations and the continuation of some degree of sovereignty post-treaty.²⁰ As will be reviewed in the second section of this paper, treaty histories encompass a wide variety of experiences and agreements, including occasions that suggest fraud and abuses on the part of the Crown and disagreement regarding the meaning and significance of particular treaties. The variety of historical experience suggests that treaty federalist and treaties-as-consent narratives may potentially be destabilized by historical accounts that contradict such narratives. Should potentially a-historical accounts be relied on as cornerstones of Canadian sovereignty? In relation to Henderson’s narrative, Mark

¹⁸ James [sa'ke'j] Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) [Henderson, *Treaty Rights*].

¹⁹ *Ibid.* at 1005.

²⁰ See, e.g., Borrows, “Ground Rules” *supra* note 3; Macklem, *supra* note 3; Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35-55 [McNeil, “Negotiated Sovereignty”]; and Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000-2001) 26 Queen’s Law J. 143 [Christie].

Walters has commented that his “legal arguments would collapse without the historical foundations” on which his narrative is built.²¹ Walters resolves the concern for the potential lack of historicism in Henderson’s account by pointing out that lawyers and historians belong to different interpretive communities, and that lawyers such as Henderson treat law in history as a normative concept rather than an empirical one. As such, Henderson’s argument regarding the legal and constitution effect of treaties is judged from “an amalgam of historic commitments interpreted today with a view to the coherence...of the present legal order.”²² Thus, the demand for the past to be brought into line with a standard of consent exists in the present.

The problems and consequences of potential disjunctures between the specificity and pastness of a historian’s account on the one hand and the presentist generality of the accounts by legal scholars on the other will be further discussed in the later sections of this paper. For now, the focus is on political theory, which offers other ways to consider the relationship between law and history around the issue of consent. First, the normative weight of consent in accounts of treaties as a constitutional event can be taken to demand that weak or incomplete treaties and fraudulent acts in this history be addressed through reconsideration and renegotiation in the present. James Tully, for example, suggests:

Just because a particular practice of consent, such as a treaty with a non-European authority, is surrounded by force and fraud, it does not follow that the practice of treaty making loses its authority. As with any kind of contract, what follows is

²¹ Walters, “Covenant Chain”, *supra* note 4 at 93.

²² *Ibid* at 94.

that the honour and duty of the Crown require that the specific violation of the treaty caused by the force or fraud must be remedied in some manner. ...If anything, the very fact that one can distinguish between a consensual treaty and force and fraud strengthens, rather than weakens, the practice of treaty making.²³

In these comments, Tully shifts the idea of consent from a moment in time to something that emerges over time. He differentiates between points of agreement and commitment to the forums through which those points of agreement are worked out. This shift suggests that consent itself may be more of a process than an event. It also anticipates the second constitutional dimension of treaties to which we now turn our attention.

ii. Treaties as Framework/Relationship/Process

The appeal of treaties has attracted the attention of numerous constitutional theorists in recent years. For Tully, for example, the historic treaty-making patterns and policies of colonial North America, which he terms “treaty constitutionalism,” provide an exemplar of three conventions he contends are required to support a post-imperial constitutionalism: mutual recognition, continuity, and consent.²⁴ In such accounts, the *process* of treaties is as or more important than treaties as historical, constitutional event. What “actually happened” in 1760, 1854, or 1899 matters less than that treaties were made on those dates because treaties convey mutual recognition between the parties and

²³James Tully, “Consent, Hegemony, and Dissent in Treaty Negotiations” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233 at 238 [Tully, “Consent”].

²⁴James Tully, *Strange Multiplicity*, *supra* note 3 at 116-117, ff.

consent to deal with each other (a less momentous moment of consent to be sure). As

Patrick Macklem explains, treaties are

instruments of mutual recognition.... The treaty process is a means by which competing claims of authority and right can be reconciled with each other by each party agreeing to recognize a measure of the authority with the other.... As an instrument of mutual recognition, a treaty is an ongoing process, structured but not determined by the text of the original agreement, by which parties commit to resolving disputes that might arise in the future through a process of dialogue and mutual respect.²⁵

Treaties are thus not simply or primarily historical markers of significant moments in the formation of the Canadian state, but also a lasting commitment to a mechanism for renewing and maintaining a just Crown-aboriginal relationship. This conception of treaties in turn leads to critiques of the emphasis on achieving certainty and finality in modern treaty processes. Instead, scholars have argued that renewed relationships and ongoing processes of negotiation should be the aim of contemporary treaty processes.²⁶

These accounts draw on and are paralleled by diverse accounts of indigenous conceptions of treaties and the manner by which they structure and guide relationships. Two-Row Wampum (*Gus-Wen-Tah*) is well known for its elegant expression of the Haudenosaunee conception of the treaty relationship between their confederacy and European newcomers. The two parallel strips of purple shell beads on this wampum belt

²⁵ Macklem, *Indigenous Difference*, *supra* note 3 at 155. See also Henderson, *Treaty Rights*, *supra* note 18.

²⁶ See, e.g., Mark L. Stevenson, "Visions of Certainty: Challenging Assumptions", *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) 113; Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005); and Ravi de Costa, "History, Democracy, and Treaty Negotiations in British Columbia" in Alexandra Harmon, ed., *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 297.

are explained as representing continued autonomy while the white rows represent peace, friendship and respect, suggesting that autonomy of both indigenous and settler political communities is supported by their interdependence and mutual support.²⁷ The covenant chain is another well-known Haudenosaunee legal concept that was widely used in relations between the British and First Nations in the Great Lakes region. The links of the chain describe “notional links of kinship, an extrapolation of the clan unit that was the basic building block of local, national and confederal aboriginal political organizations.”²⁸ The chain was not self-maintaining, but rather required frequent attention through councils and diplomatic practices to keep it “bright.”²⁹ Both Two-Row Wampum and the covenant chain convey a feature of indigenous conceptions of treaty that has been broadly noted: treaties are best understood as “vital, living instruments.”³⁰ Constitutional theorists have borrowed heavily from this characterization of treaty as relationship to arrive at their accounts of treaties as a dynamic, ongoing constitutional process.

A further aspect of indigenous conceptions of treaty that is relevant to understanding their constitutional dimensions is the frequent emphasis on the sacred character of treaties. Ceremonies and protocols, such as pipe ceremonies, that

²⁷See, e.g., John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 149-150; Walters, “Covenant Chain” *supra* note 4 at 82.

²⁸Walters, “Covenant Chain” *ibid.* at 81.

²⁹*Ibid.* at 82-83.

³⁰RCAP, *supra* note 3, vol. 1, chpt. 3 at 37. See also Robert A. Williams Jr., *Linking Arms Together. American Indian Treaty Visions of Law and Peace, 1600-1800* (New York; Oxford: Oxford University Press, 1997) [Williams, *Linking Arms*].

accompanied the negotiation of treaties expressed the sacredness of the negotiations and their outcome.³¹ Sacredness also signifies the permanence of the peace and friendship established through the agreement.³² The Supreme Court has adopted this language, frequently stating that treaties are sacred agreements, made up of solemn promises. In the jurisprudential context, the Supreme Court uses this language to assert both the legally binding nature of these agreements as well as their permanence.³³ Permanence is a necessary part of the characterization of treaties as constitutional, since constitutions, by their very nature, are built to last.³⁴ But which aspects of a treaty are permanent, and thus, constitutional? How do we identify and work with the evolutionary aspects of treaties while respecting their permanence?

Litigants asserting particular treaty rights locate this permanence in specific terms and rights (both before and after s. 35 of the *Constitution Act, 1982*). The jurisprudence follows their lead. However, the conception of treaties articulated by indigenous voices

³¹See, e.g., *Treaty 7*, *supra* note 3 at 7 and Williams, *Linking Arms*, *ibid*, chpt 2.

³²See, e.g., *Treaty 7*, *ibid*. (peace alliances were “binding for all time”).

³³See, e.g., *R. v. Sioui*, *supra* note 1 at 1063 (“It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred.... The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.”).

³⁴ The sacredness of treaties also connects treaties to religion, made more apparent through ceremonies that accompany treaty making. Such ceremonies (e.g., pipe ceremonies) often involve connecting the actions of the leaders to spiritual realms, situating them in creation and recalling the sources or nature of their authority. While beyond the scope of this paper, it is also helpful to recall the deep religious roots of European political authority in Europe as well as in America (regarding the latter, see, e.g., Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North American” in John McLaren, A.R. Buck, & Nancy E. Wright, eds, *Despotic Dominions: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50) [Slattery, “Paper Empires”]. Thus, the sacredness of treaties presents another dimension of constitutionality by recalling the sources of political authority.

does not require that permanence attach to particular terms. Instead, permanence attaches to the living relationship that is the central defining feature of the treaty.³⁵ Particular terms operationalize that relationship, and as “solemn promises,” cannot be put aside lightly or without the consent of the indigenous parties. But any working relationship requires adjustment overtime, and thus a conception of treaty as relationship requires, as a corollary, some flexibility in its terms.

The variety of terms available to describe treaties in indigenous languages reinforces this claim. Indigenous languages specifically appear to distinguish between types of agreements on the basis of whether the agreements were fixed or open for additions and evolutions. As historian John Long explains, “Oral agreements were not fixed or final; they were revisited when circumstances warranted. Hunting territories, for example, had sometimes to be adjusted. When a man died, others might not want to hunt on his land, for ‘the animals leave the territory in search of him.’”³⁶ Similarly, the Treaty 7 Elders state that alliances for the purposes of trade did not carry with them the same binding and immutable character of peace alliances,³⁷ and the Royal Commission on Aboriginal Peoples reports that “in the Ojibwa language ... there is a difference between *Chi-debakhk-(in)-Nee-Gay-Win*, an open agreement with matters to be added to it, and

³⁵ For a related discussion of indigenous constitutional practices, see Borrows, “(Ab)Originalism”, *supra* note 4.

³⁶ John S. Long, *Treaty No. 9. Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 346 [Long, *Treaty 9*], citing Brian Craik, “Making a Living in the Bush: Land Tenure at Waskaganish” (1986) 28 *Antropologica* 175.

³⁷ *Treaty 7*, *supra* note 3 at 7.

Bug-in-Ee-Gay, which relates to ‘letting it go’. According to the oral tradition of the Ojibwa, the Lake Huron Treaty of 1850 was to be ‘added to’.”³⁸ Conceptions and language that portray an evolving relationship also illustrate this specificity and sophistication. The covenant chain set in motion a framework through which differences were attended to and further negotiations were fostered, and thus reaffirmed the peace and alliance it expressed.³⁹ Similarly, James Henderson reports that the Treaty of Niagara was conceptualized by the Ojibwa “as a helping agreement (*wechizinchikewina*) or creation of a helping system (*apichchikan*).”⁴⁰ These accounts of treaties suggest a fine balance between maintaining the fundamental shape of a relationship defined through a treaty and allowing that relationship to grow, shift, and adjust to changing conditions over time. It is a process that has been likened by some scholars to the “living tree” metaphor that has, since the 1930s, described constitutional interpretation in Canada.⁴¹

The tensions inherent in maintaining stability and preserving the consensual foundations, while allowing growth and change within a relationship are further elaborated by accounts of how consent grounds the legitimacy of democratic political communities. Political theorist Duncan Ivison explains that because individuals are embedded in relationships and interdependencies to which they either did not or could

³⁸ RCAP, *supra* note 3 vol. 1, chpt. 3, at 28, online: <
http://www.collectionscanada.gc.ca/webarchives/20071207025829/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg11_e.html#37> .

³⁹ Walters, “Brightening the Covenant Chain”, *supra* note 4 at 82-85

⁴⁰ Henderson, *Treaty Rights*, *supra* note 18 at 228.

⁴¹ Borrows, “Ground-Rules,” *supra* note 3 and Walters, “Covenant Chain”, *supra* note 4 at 94.

not have consented, we should not look for “evidence of primal or continuing consent” but rather “evidence of *contestability* – for the capacity of people to effectively contest those norms or actions acting on them and to alter or shape their course in different ways.”⁴² Thus, consent itself becomes a process rather than an event.

Moving such approaches into the realm of treaties, many constraints on the possibility of a ‘true’ moment of consent are evident. As many observers have noted regarding historical treaty negotiations, First Nations may not have had much choice about whether to take a treaty or not⁴³ and contemporary negotiations and implementation processes continue to be constrained by numerous markers of power imbalance between First Nations and the Crown.⁴⁴ Tully identifies these present-day conditions as the “problem of hegemony”, whereby treaty negotiations are circumscribed by legal, political, and economic institutions that have been imposed on indigenous peoples and by discursive traditions defined by Western theories that justified colonial authority and

⁴²Duncan Ivison, “Consent or Contestation” in Jeremy Webber & Colin M Macleod, eds., *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 188 at 193-4 [emphasis in original]. This view stems from Ivison’s argument that to “we are embedded in all manner of relationships and forms of interdependency to which we did not (and could not) consent. And so, our focus shifts from an emphasis on the presence or absence of consent to the nature of those relations and interdependencies.”

⁴³ See, e.g., René Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11 (1870-1939)* (Toronto: McClelland & Stewart, [Foreword 1973]); Long, *Treaty 9*, *supra* note 36; Michael Coyle, “Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties” (2008) 32 *Manitoba L. J.* 34 [Coyle, “Marginalized”].

⁴⁴ See, e.g., Murray Browne, “The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia” in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book Co., 2009) 465-505 [Browne]; Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005); and, Gabrielle A. Slowey, “Unfinished Business: Self-government and the James Bay Northern Quebec Agreement Thirty Years Later” in Yale D Belanger, ed., *Aboriginal Self-Government in Canada. Current Trends and Issues* (Saskatoon: Purich Publishing Ltd., 2008) 206; Lornie Report, *supra* note 6.

continue to underpin global political and economic regimes.⁴⁵ Under these conditions, treaty negotiations do not take place on a level playing field and there is little room to dispute the boundaries of the negotiations. Nevertheless, Tully contends that parties should not reject negotiations: “The aim of entering into negotiations is precisely to change unequal circumstances... To reject negotiations because of the unequal initial conditions is to be taken in by the false normative ideal of negotiation among free and equal partners that serves to obscure the real world of negotiations among differentially free and unequal partners.”⁴⁶ Parties must therefore challenge the agenda and boundary conditions of negotiations and reject the notion that the field of negotiations is fixed by the boundaries of official treaty processes. Thus, Tully includes actors within governmental and judicial institutions, negotiations in other contexts, and indigenous and non-indigenous peoples contesting those institutions through a variety of actions in national and international arenas as all contributing to the discursive field of treaty negotiations. From these premises, Tully arrives at a picture of treaty processes that encompass “a much broader *field* of consent and dissent, and a much broader range of *practices* of consent and dissent” which unpredictably shape “ongoing and open-ended relationships among unequal partners that are continually modified by their practices of consent and dissent, agreement and disagreement, and negotiation and renegotiation.”⁴⁷

⁴⁵ Tully, “Consent”, *supra* note 23 at 241.

⁴⁶ *Ibid.* at 247.

⁴⁷ *Ibid.* at 249 [emphasis in original].

Tully's approach emphasizes treaty processes as political processes. As constitutional rather than ordinary political processes, the politics of treaties constitute political communities: indigenous, non-indigenous, and the presumably federated communities formed through their interactions. Tully points out that non-hegemonic treaty processes demand that not only the process, but also the boundaries and shape of the communities constituted and reconstituted through these processes must be contestable. Further, the centrality of contestability in treaty processes suggests that the interests and values of treaty parties may not become merged or reconciled.

Most fundamentally, a non-hegemonic view of treaty processes should allow for the contestation of sovereignty – how it was acquired, and its present form and legitimacy. Referring to the difference between politics and “the political” in the political theories of Hannah Arendt and Chantal Mouffe, Andrew Schaap explains, “the concept of the political refers to a certain potentiality within politics according to which commonality emerges out of difference. In other words, the political refers to a dynamic inherent within political action by which a ‘we’ comes to be articulated.”⁴⁸ This is a useful distinction to bring to treaties, and particularly with Schaap's emphasis on agonism and concerns to not presume reciprocity in dialogues within divided societies (such as a dialogue involving historically aggrieved and persistently unequal treaty

⁴⁸ Andrew Schaap, “Agonism in Divided Societies” (2006) 32 *Philosophy & Social Criticism* 255 at 271 [Schaap].

partners) and to maintain the dynamic of contestation.⁴⁹ A non-hegemonic approach to treaties will thus recognize treaty processes as politics and the hoped-for transformation upon a treaty settlement as an expression of the political. The latter aspiration is for a utopian ideal that may not manifest even while parties' participation in treaty processes suggests that at least some notion of the political "we" has already emerged.⁵⁰ The risk of not giving such a wide berth for difference within and around treaty negotiations is the potential of hegemonic forces to push the emergence of a more complete and settled "political moment" even further away.

Political theorists thus urge us to understand the constitutional moment of treaties to be an ongoing one, to conceive of treaty processes broadly, and to accept that as much dissent as consent might be present within a given treaty. These political accounts stand in contrast to juridical narratives that tend to emphasize finality, the accomplishment of discrete treaties, and a jurisprudence focussed on treaty rights defined by discrete moments of "common intention." We will return to these contrasts in sections two and three of the paper, but we first turn to the generative aspect of treaties, a third

⁴⁹ For the adaptation of agonism to address democratic politics in pluralist societies, see Monique Deveaux, "Agonism and Pluralism" (1999) 25 *Philosophy & Social Criticism* 1.

⁵⁰ According to Schaap, the idea of 'the political' represented here is more Arendt than Mouffe. Mouffe's view of the political embeds dynamics of ongoing disagreement (perhaps the treaty moment that is), while theorists have interpreted Arendt's view of the political as expressing a more of utopian, aspirational, or transformative 'we' (capturing perhaps the hopes and expectations embedded in treaty processes and why such processes are so often perceived as a disappointment). See Andrew Schaap, "Political Theory and The Agony of Politics" (2007) 5 *Pol Studies Rev* 56.

constitutional dimension of treaties that builds on the analysis of treaty processes and relationships.

iii. Treaties as Generative

Drawing on Robert Cover's *Nomos and Narrative*, Robert Williams Jr describes the multi-nation and multicultural world of colonization as "held together by the jurisgenerative force of the common interpretive commitments to a law created and shared by the different peoples of Encounter era North America."⁵¹ Within this world, treaties and indigenous diplomatic traditions were important forces regulating and producing an emerging shared normative context.⁵² Similarly Brian Slattery and Jeremy Webber have situated treaties as part of a larger set of intersocietal processes.⁵³ Brian Slattery describes Canadian constitutional foundations as "organic," suggesting North American as well as British origins for our constitutional traditions. Those North American origins include a body of "intersocietal law" arising from "interaction of Aboriginal nations and British and French officials in eastern North America during the seventeenth and eighteenth centuries."⁵⁴ To this body of law, Slattery adds the philosophical foundations of the natural law tradition, through which principles of justice

⁵¹ Williams, *Linking Arms*, *supra* note 30 at 28.

⁵² See, e.g., Walters, "Covenant Chain", *supra* note 4 at 88-89.

⁵³ Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L J 101 [Slattery, "Organic"]; Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L J 623 [Webber, "Relations"].

⁵⁴ Slattery, "Organic" *ibid.* at 109.

become intertwined with the intersocietal custom to inform the present day content of Aboriginal rights. For Webber, aboriginal rights “are the result of the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience.... They constitute a set of norms that are fundamentally intercommunal, created not by the dictation of one society, but by the interaction of various societies through time.”⁵⁵ In contrast to Slattery, however, Webber sees this process as one of practical reason, emergent from processes of interaction and reflection on that interaction, without resort to overarching principles of justice.

Many accounts of aboriginal rights identify the sources of aboriginal and treaty rights as distinct, juxtaposing the consensual basis of treaty rights with the customary basis of aboriginal rights.⁵⁶ Slattery’s and Webber’s accounts, however, suggest a close relationship between the two types of rights. Aboriginal rights emerge from a larger field of intersocietal normativity, a field grounded in both negotiated (treaty-based) as well as customary norms.⁵⁷ The inclusion of a broader field of norm generation in accounting for

⁵⁵ Webber, “Relations” *supra* note 53 at 638.

⁵⁶ See, e.g., Patrick Monahan, *Constitutional Law*, 3d ed (Toronto: Irwin Law, 2006) at 447-8: “Aboriginal rights and the Treaty rights of Aboriginal peoples differ in both origins and structure. Whereas Aboriginal rights flow from the historic use and occupation of land by Aboriginal peoples, Treaty rights are those contained in official agreements between the Crown and Aboriginal peoples. Treaties thus create enforceable obligations based on the mutual consent of the parties.” Leonard Rotman’s critique of the transfer of the *Sparrow* justification test from aboriginal rights to treaty rights is similarly premised on treaty rights as negotiated in origin (Leonard I. Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test” (1997) 36 *Alta L Rev* 149).

⁵⁷ Webber does not address the relationship between treaty and other Aboriginal rights explicitly. However, his account of intercommunal normativity considers early land purchase agreements and other instances of explicit negotiation, which indicates a fluidity between negotiated and customary norms. A similar caliber of negotiations will be discussed later in this paper as examples of early treaties.

the constitutional significance of treaties has parallels with Tully's description of the broader fields of treaty discourse in contemporary contexts. It also anticipates the discussion below of treaties in history, in which I argue that Canadian treaty-making has generally been iterative in nature, building upon experience, reflection, and previous rounds of negotiated relationships and accommodations. Generative accounts thus situate treaties in broader processes of norm formation between societies. As such, these narratives place less significance on moments of consent as founding a post-colonial constitutional order, emphasizing instead the formation of a constitutional order that draws on both indigenous and European contributions and traditions.

All of the different accounts of the constitutional dimensions of treaties addressed above draw on historical experience to suggest the path forward. In these accounts, treaties are both constitutional politics and constitutional law, and they provide a narrative frame in which to understand the Crown-aboriginal relations, aboriginal rights, and the potential for post-colonial constitutional foundations. As narrative frames, however, they do not directly address the proper balance between fidelity to historical commitments and evolution through present-day treaty processes required to support dynamic treaty relationships and processes of consent and dissent. Moreover, against these ideals, locking-in particular treaty rights via constitutional protection – the one

constitutional aspect of treaties presently recognized at law⁵⁸— may seem at odds with the aspirations of most of these constitutional narratives. We will return to consider the jurisprudential prescriptions that emerge from these narratives in the third part of this paper. But first, we turn to consider treaties in history to ground the historical experience that has informed these constitutional narratives and to understand the narratives that are produced by the discipline of history itself.

2. Treaties in History

At this point in the discussion, it will be helpful to ground the theoretical accounts of treaties with a “descriptive” account of treaties in history. However, as will be rapidly apparent from this overview, treaty histories are not simply descriptive. History is an interpretive discipline encompassing a range of methodologies. Thus, what constitutes a “treaty” in history, and, more contentiously, the nature of relations expressed by a treaty and the materials relevant to understanding such things, are matters of interpretation.

It is also not easy to discuss Canadian treaty histories in a generalized manner given the chronological and geographic scope of such an endeavour. Jim Miller remarks that “[w]hile there are several studies that look at specific treaties, ... there is none that

⁵⁸ Section 35(1) of the *Constitution Act, 1982* recognizes and affirms “existing aboriginal and treaty rights of the aboriginal peoples of Canada”.

surveys the entire field.”⁵⁹ Nevertheless, the need for benchmarks for understanding treaties – particularly in law – has led to valiant attempts to summarize treaty-making into eras and/or types. These efforts include Miller’s recent contribution aiming to remedy the void he identified. In light of the aims of this paper, it is the shape of the narrative that flows from generalized accounts that is of most interest in this discussion. The story of treaties at a general level forms a baseline from which treaty interpretation proceeds and the conceptual unity against which particular treaty rights are interpreted. This section therefore proceeds by addressing dominant historiographical themes and then reviewing survey approaches that attempt to provide a birds-eye view of Canada’s treaty-making experience. I will then move on to critique these accounts, drawing on the constitutional narratives of treaties in the previous section to argue that Canada’s treaty-making history is better expressed by the concept of “treaty processes” rather than “treaties.”

i. Themes

Treaty-making has arguably been central in indigenous-Crown relations in North America from first contact and continuing on today. It is one of the most persistent features of both colonial and Canadian state relations with indigenous peoples. Beyond that, summary statements about treaty histories should be made cautiously. There was,

⁵⁹ J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at xi [Miller, *Compact*].

after all, no uniform experience of colonization in what became Canada. As Sarah Carter describes, these former British colonies and possessions were characterized by a

Diversity of Aboriginal people, their varied environments and resources, and ...unique patterns of contact with newcomers [which] meant that there was no single or monolithic pattern of encounter with settlers. Aboriginal land for agriculture was desired by settlers in many localities, but not in others where Aboriginal labour was necessary to extract resources, and where the land did not invite intensive settlement, as in the massive territories of the fur trade well into the twentieth century... Nor did the Imperial government pursue a consistent, uniform policy toward the colonies of British North America; rather, there was an ad hoc set of responses to local conditions, which were in part the result of initiatives, politics, and diplomacy of Aboriginal nations seeking to direct the structure of their relationship with the British.⁶⁰

In light of such regional, cultural, and chronological variations in colonial experience, any attempt to briefly describe or summarize treaty histories will come up short.

Nevertheless, amongst related and neighbouring peoples, regions, and eras, and even across different ones, there are remarkable similarities of experience to be found.

In sharp contrast to the “corrective” narratives canvassed in Part 1, which emphasize the generative and transformative potential of treaties, accounts of treaties in history have been a significant component of the larger narrative of indigenous victimhood at the hands of British colonizers. Early accounts assumed that First Nations were powerless and their circumstances tragic,⁶¹ accounts that accepted and perpetuated

⁶⁰ Sarah Carter, “Aboriginal People of Canada and the British Empire” in Phillip Buckner, ed., *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 200 at 200 [Carter].

⁶¹ See, e.g., Fumoleau, *supra* note 43; George F.G. Stanley, “The Indian Background of Canadian History” (1952) 31 Report of the Annual Meeting of the Canadian Historical Association 14; For brief discussions of this type of historiography see Jean Friesen, “Magnificent Gifts: The Treaties of Canada with the Indians of

the persistent colonial myths of “the passive, unsophisticated Indian who easily submits to superior European technologies” and “the perceived right and legal authority” of the colonial powers to acquire the subject territories.⁶² Since the 1980s, treaty histories have attempted to move past these colonial tropes by emphasizing both indigenous and colonial perspectives in treaty negotiations in full historical and cultural context,⁶³ paralleling developments in the historiography of indigenous-settler relations more generally.⁶⁴ Histories that take this approach pay greater attention to the parties’ individual and collective knowledge and strategic calculations in historical context, allowing regional and chronological variations in the power balance to come to the fore. They attempt to avoid what Alexandra Harmon calls the “outcome-oriented perspective

the Northwest 1861-76” (1986) series 5, vol 1 Transactions of the Royal Society of Canada 41 [Friesen], and Long, *Treaty 9*, *supra* note 36.

⁶² Paul W. DePasquale, “Refractions of the Colonial Past” in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) xv at xxiii and xxiv.

⁶³ See, e.g., Friesen, *supra* note 61; Robert J Talbot, *Negotiating the Numbered Treaties. An Intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing Ltd, 2009); Sarah Carter, *Lost Harvests. Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 54-57 .

⁶⁴ See, e.g., Daniel K. Richter, “Whose Indian History?” (1993) 50 *The William and Mary Quarterly* 379; James Axtell, *Natives and Newcomers: The Cultural Origins of North America* (New York: Oxford University Press, 2001); James H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: W.W. Norton & Co., 1999); Richard White, *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Regions, 1650 - 1815* (Cambridge: Cambridge University Press, 1991) [R White, *Middle Ground*]; Germaine Warkentin & Carolyn Podruchny, eds., *Decentring the Renaissance: Canada and Europe in Multidisciplinary Perspective, 1500-1700* (Toronto: University of Toronto Press, 2001); John S. Lutz, *Makúk. A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008).

on power relations” from eclipsing a more subtle and grounded view of treaties in history.⁶⁵

Even with greater attention to context and participant agency, colonial interests such as the acquisition of land continue to be central to how the meaning and significance of treaties are often conveyed.⁶⁶ Such interpretations bring attention to the naked power of the British colonizers and the injustices of this past, emphasizing the unconscionable power relations that accompanied many treaty negotiations and the breaking of treaty commitments, or ineffective enforcement of treaty rights that often followed immediately after treaties were made. There is no doubt that such interpretations remain viable historical interpretations, notwithstanding historiographic trends that emphasize indigenous contributions to treaties.

The decentring directions from indigenous-settler studies suggest that treaty histories should not fall into an ‘either/or’ dichotomy; treaties were neither entirely reflective of indigenous traditions, power and interests nor of colonial ones. These directions leave some treaty historians grappling with how to reconcile indigenous

⁶⁵Alexandra Harmon, “Introduction. Pacific Northwest Indian Treaties in National and International Historical Perspective” in Alexandra Harmon, ed., *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 3 at 18.

⁶⁶ See, e.g., John Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal & Kingston: McGill-Queen’s University Press, 2003) chptr 4; Dorothy V. Jones, *License for Empire. Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982) [Jones, *License for Empire*]; Patricia Seed, “Three Treaty Nations Compared: Economic and Political Consequences for Indigenous Peoples in Canada, the United States, and New Zealand” in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) 17-32 [Seed].

influence and perspectives with colonial ones in their interpretations of treaty meanings. Indeed, some historians do not interpret the historical treaties as having produced shared meanings, or common or middle grounds.⁶⁷ John Long, for example, opens his detailed consideration of Treaty no. 9 with an either/or proposition – “Was it a trick or a treaty? Was treaty-signing in far northern Ontario simply a ruse, whereby the Indigenous signatories were fooled into signing a complex legal document that took away their rights? Or do their signatures signify their agreement to more general promises that constitute an oral agreement, misunderstood by most Canadians?”⁶⁸ His book-length exploration of these issues shows a treaty history that encompasses abuses by the colonial powers as well as contributions by the indigenous parties attempting to shape the process and substantive commitments undertaken. He ends with reflections on concerns and unresolved issues in the present and calls for modern revision of Treaty no. 9, an end point that recalls the presentist orientation of the constitutional narratives and their insistence that the meaning and significance of historic treaties are still being worked out

⁶⁷ See, e.g., Sidney L. Haring, “‘There Seemed to Be No Recognized Law’: Canadian Law and the Prairie First Nations” in Louis A. Knafla & Jonathan Swainger, eds., *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005) 92-127 [Haring, “No Recognized Law”], Sarah Carter, “Aboriginal People of Canada and the British Empire” in Phillip Buckner, ed., *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 200-219 at 215 (regarding the numbered treaties in particular).

⁶⁸ Long, *Treaty 9*, *supra* note 36 at 3.

today.⁶⁹ This potential for seemingly opposing interpretive lenses to co-exist is a caution to bring forward into the review of survey treatments of historical treaties below.

ii. Taxonomies and Chronologies

Historians have not generally been interested in surveying the breadth of treaty-making experience in Canada. Historiographical trends towards deeply contextual studies of indigenous-settler relations do not make this type of project more likely. Instead, it is lawyers whose discipline demands summary descriptions of Canada's treaty-making traditions. Such overviews help contextualize a given treaty against a general understanding of treaties and suggest how one treaty history might relate to others. They also provide the backdrop for discussions of colonial policy development and aboriginal rights. Generalized overviews about the nature of historic treaties thus provide a basic narrative against which aboriginal rights are understood in law if not history. As a result, historical overviews of treaties should be approached critically, with awareness that their significance may echo well beyond debates of a historiographical nature.

Canadian history is reported to encompass more than 500 historic treaties.⁷⁰ A common method for summarizing this history divides treaty-making into pre- and post-

⁶⁹ The adhesion of McLeod Lake Indian Band to Treaty 8, signed in 2000, also illustrates that historic treaties can be a matter of active present expansion and/or negotiation (online: < <http://www.gov.bc.ca/arr/firstnation/tsekani/default.html>); See Robert Irwin, "Treaty 8: An anomaly revisited" (2000) 127 BC Studies 83 (Irwin notes that the agreement was reached in 1999). The adhesion settled the Band's land claims, and now the Band is pursuing self-government through the BC Treaty process (online: < <http://www.bctreaty.net/nations/mcleod.php> >).

1850, which sets the Robinson treaties on the northern shores of Lake Superior and Huron as the dividing marker.⁷¹ Alternatively, the treaty timeline is divided by confederation, with the post-confederation era coinciding with the negotiation of the numbered treaties in the old northwest.⁷² Confederation as a divider emphasizes a change in colonial authority from colonial governments to the new Dominion government. By contrast, 1850 more clearly marks the beginning of a new phase of treaty-making in which treaties covered larger territories. The earlier date also signifies the completion of a shift in the subject matter of treaties from alliance to land that began with the Royal Proclamation on 1763.⁷³ Alliances, generally known as ‘peace and friendship treaties,’ established or re-affirmed peace through establishing mutual military support or

⁷⁰ Donald Purich, *Our Land: Native Rights in Canada* (Toronto: James Lorimer & Co., 1986) at 96 [Purich]. This number is specific to what Purich calls “land deals” struck since the 1700s. He also notes that “over half a dozen of treaties of peace and friendship were signed before 1763 between the British and the Indians” (*ibid.*) Even with this large number, Robert J Surtees notes that, prior to the modern treaty-making era, “[o]nly about one-half the lands of Canada have been the object of a formal cession agreement, or treaty, between the Indians and federal government” (“Canadian Indian Treaties” in William C. Sturtevant, ed., *Handbook of North American Indians*, vol 4 (Washington: Smithsonian Institution, 1978) 202 at 202.

⁷¹ See D. N. Sprague, “Canada’s Treaties With Aboriginal Peoples” (1995) 23 *Manitoba Law J* 341 [Sprague].

⁷² See, e.g., James [sákéj] Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Sask. L. Rev.* 241 at 248, who divides treaty models into Georgian and Victorian, perhaps as a way to emphasize the relationship between Monarch and First Nation, but notes the Victorian model as post- confederation rather than post-1850. See also Hamar Foster, “Canada: ‘Indian Administration’ from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights” in Paul Havemann, ed., *Indigenous Peoples’ Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999) 351 [Foster, “Indian Administration”]; and The Constitutional Law Group, eds., *Canadian Constitutional Law*, 4th ed (Emond Montgomery, 2010) at 613. The latter two divide treaties into 3 eras: pre-confederation, post-confederation, and modern.

⁷³ See, e.g., Peter W. Hogg, *Constitutional Law of Canada*, 2012 Student ed. (Toronto: Carswell, 2012) at 28-34; Sprague, *supra* note 71; Mark D. Walters, “Promise and Paradox: The Emergence of Indigenous Rights in Canada” in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds., *Indigenous People sand the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 21 at 34-35; and Simon Young, *The Trouble with Tradition. Native Title and Cultural Change* (Sydney: The Federation Press, 2008) at 48-51.

neutrality. Such agreements often included or set the stage for trading commitments with indigenous peoples, which were an important element of maintaining peaceful relations in at least the eighteenth century.⁷⁴ They also often encompassed terms of goodwill, protection, and continued access to the resources required to maintain indigenous livelihoods, as exemplified in the 1752 and 1760-61 treaties with the Mi'kmaq, at issue in the *R v Simon*⁷⁵ and *R v Marshall*⁷⁶ decisions respectively.

The characterization of these agreements as peace and friendship treaties does not recognize that, in spite of an absence of land cession terms, the agreements addressed land and territory as matters of jurisdiction. Such agreements may have specified colonial boundaries or they may have addressed the establishment of new settlements; the British treaty with the Mi'kmaq in 1726 is an example. It included clause III: "That the Indians shall not molest any of His Majesty's Subjects or their Dependents in their Settlements already made or Lawfully to be made."⁷⁷ William Wicken reads this clause against the post-1713 Treaty of Utrecht context in which this treaty was negotiated, suggesting that the British did not have exclusive jurisdiction over Mi'kma'ki where lands were occupied by both Mi'kmaq and Acadians and that Mi'kmaq would have expected the lawful processes required by the treaty to have included their consent to new uses of their

⁷⁴ Jones, *License for Empire*, *supra* note 66 at 97.

⁷⁵ *Simon*, *supra* note 14 .

⁷⁶ *R v Marshall*, [1999] 3 SCR 456 [*Marshall*].

⁷⁷ Cited in William C. Wicken, *Mi'kmaq Treaties on Trial : History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002) at 118 [Wicken, *Mi'kmaq Treaties*].

lands.⁷⁸ In Wicken's interpretation, "the intent of the treaty was to create norms of behavior that would enable co-existence between the British and the Mi'kmaq in Nova Scotia."⁷⁹ As we will return to below, this interpretation of a so-called peace and friendship treaty has strong parallels to indigenous interpretations of the later numbered treaties.

In survey treatments, the post-1850 and post-confederation period is typified by treaties that dealt with large expanses of territory and many Indian nations or tribes. The written terms address land surrenders, annual presents or annuities, commitments to set aside reserves, and continued access to Crown lands for harvesting activities until taken up for settlement. They are thus presumed to be different in scope and nature than the eighteenth-century peace and friendship agreements. The numbered treaties have also been further divided by some historians into the first seven "settlement treaties" (1871-1877) and the later three "northern resource development" treaties (1899-1921), drawing attention to the different impetus for colonial action in these two time periods.⁸⁰

Between these two main types of treaties, some surveys attend to the Royal Proclamation of 1763 and treaties in Upper Canada in the late eighteenth and early nineteenth centuries.⁸¹ Following the formalization of British treaty-making policy in the Royal Proclamation, scholars note a transitional era in which a critical shift occurs after

⁷⁸ *Ibid.* at 118-130.

⁷⁹ *Ibid.* at 127.

⁸⁰ Long, *supra* note 13 at 32, citing James Morrison. See also Miller, *Compact*, *supra* note 59.

⁸¹ See, e.g., Miller, *Compact*, *ibid.* and Foster, "Indian Administration", *supra* note 72.

the war of 1812 when the British need for military support from indigenous allies waned and settler pressures for land increased.⁸² Prior to 1812, the move from the peace and friendship format towards the geographically limited land cession agreements of the second period was already in progress.⁸³ Further changes were introduced in the later era, replacing one-time payments with annual annuities – which Miller has noted was introduced to reduce the financial burden of treaty-making on the colonial treasury – and connecting treaty-making to the creation of reserves.⁸⁴ Regardless of changing colonial interests, treaties continued to encompass terms reflecting indigenous concerns to retain access to wildlife and fish harvesting areas and waterways. Similarly, the fourteen Douglas Treaties on Vancouver Island from the 1850s⁸⁵ reflected many of the elements of the contemporaneous Robinson treaties in Ontario but retained some of the character

⁸² Miller, *ibid*, chptrs 3, 4; Foster, *ibid*. at 359.

⁸³ Miller, *ibid*. See also Long, *supra* note 13 at 24-6.

⁸⁴ Miller notes that First Nations began demanding reserves as they grew more skeptical of the Crown's promises in light of increasing settler pressures and lax enforcement of earlier agreements (Miller, *Compact, ibid*, at 103). Commitments to set aside reserves first appear in the text of a treaty in the 1850 Robinson Treaties, but earlier treaties also created reserves as part of cession negotiations: e.g., the reservation of Manitoulin Island in the 1836 Treaty negotiated by Sir Francis Bond Head (*ibid*. at 106-9); and Treaty 29 between the Crown and the Chippewas in 1829, as discussed in *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641, [2001] 1 CNLR 56, at paras 66-79 (Ont Sup Ct) [*Chippewas of Sarnia* (trial)]. The Haldimand Tract of 1784, purchased from the Mississauga of the Credit and granted to the Six Nations for their loyalty to the British, is also cited as an early reserve (RCAP, vol 1 *supra* note 3 at Part One, Chapter 6, online: <http://www.collectionscanada.gc.ca/webarchives/20071211050833/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg13_e.html#43>).

⁸⁵ Hamar Foster and Alan Grove argue that there may be a fifteenth Douglas Treaty made in 1862 between the Cowichan and Governor Douglas. Their archival research shows that Governor Douglas made treaty-like commitments and promises to deliver the necessary presents and compensation to the Cowichan to facilitate settlement on Cowichan lands by non-aboriginal people. Governor Douglas' promises and commitments were not fulfilled. ("Trespassers on the Soil": *United States v. Tom* and A New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia" (2003) Summer:138/139 BC Studies 51).

of the earlier Upper Canada surrenders in that these agreements were limited in geographic scope and involved one time payments.⁸⁶

Miller's recent book-length historical survey of Canadian treaty-making is much more detailed than many of the 'snapshot' surveys noted above, but it is both the level of detail and his approach that provide a different sense of this history. Importantly, although many scholars note the evolving nature of Canadian treaty history, Miller's categorizations are less neat as he traces the chronological development of treaty-making with colonial interests that moved from east to west. This approach allows for more overlap between types and eras of treaty-making, allowing a sense of the continuity and change that has characterized this enduring practice. His survey is also more inclusive, incorporating fur trade "commercial compacts" as part of the early period of treaty history. He notes that indigenous nations would not trade without the establishment of peaceful relations, and thus these 'commercial agreements' overlap in both chronology and character with the peace and friendship agreements of the eighteenth century. Such agreements have generally been left out of legal surveys of treaty history, perhaps because the Crown was not the treaty-making entity. Not all trading companies had authority from the Crown that would be commensurate with treaty-making powers.

⁸⁶ Miller discusses these BC treaties as distinct from other Canadian traditions, noting that Douglas was provided with sample agreements from the New Zealand Company's dealings with the Maori rather than any samples from Upper Canada (Miller, *Compact*, *ibid.* at 147). Although the BC experience is undoubtedly distinct, experience in other parts of the British Empire informed activities in the east as well. Canada's treaty-making traditions need to be understood as developing out of or alongside American, French and other precedents.

Indeed, Miller's account distinguishes between agreements made by the North West Company and the Hudson's Bay Company on this very point, excluding the former from at least "official" treaty history.⁸⁷ The Hudson's Bay Company's Charter, on the other hand, purported to bestow the Company with territorial and governance authority in Rupert's Land, encompassing sufficient authority to make treaties on behalf of the Crown.⁸⁸ Regardless, the argument for inclusion of the fur trade era in treaty history does not depend on the perfect legal authority of either the European and indigenous treaty-makers in the fur trade era. The argument does not require such treaties to be individually justiciable. Instead (or in addition) fur trade treaties are significant as part of an iterative process of treaties that made subsequent treaties possible.

⁸⁷ He notes that even the North West Company made a 'formal' treaty at Thunder Bay when it meant to purchase land, but excludes this agreement from being "strictly speaking, a treaty" because the North West Company did not represent the Crown (*ibid* at 87).

⁸⁸ The legality of the Company's Charter was always contentious, but never finally tested in a court of law. See generally, Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) Spring/Summer:37 *Manitoba History* 2; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 *Manitoba L. J.* 343; Hamar Foster, "Long-Distance Justice: the Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 *Am. J. of Legal History* 1; Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763: The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 *Saskatchewan L. Rev.* 123), and Geoffrey S. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D.Jur. Thesis, Osgoode Hall Law School, York University, 1981) [unpublished] at 1309-73; Robert Baker, *Law Transplanted, Justice Invented: Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670-1870* (Master's Thesis, University of Manitoba, 1996) [unpublished], chptr 2; and Edward Cavanagh, "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670-1763" (2011) 26 *Can. J of L. & Soc'y* 25 [Cavanagh, "HBC"].

Including fur trade era treaties brings geographies frequently left out of treaty surveys – such as northern Quebec⁸⁹ and British Columbia – into the picture before the modern era. New France and the early colony of Quebec are also often left out of surveys of the country's treaty-making traditions.⁹⁰ Sébastien Grammond explains the differences of Quebec's treaty history as stemming from two points of legal history: first, the assumption that the Indian provisions of the Royal Proclamation did not apply to the colony of Quebec; and second, the lack of a requirement to seek indigenous consent to land cessions within French colonial law or policy.⁹¹ But these differences simply mean that treaties in Quebec were not land cession agreements, not that there were no treaties of note. Indeed, important treaty rights cases have arisen from the geography of present-day Quebec.⁹² Similarly, British Columbian territory beyond Vancouver Island (Douglas

⁸⁹ Maps of Canada's historic treaties routinely leave the province of Quebec blank; see, e.g., the Department of Aboriginal and Northern Affairs, which lists 18th century peace and friendship treaties from the Maritimes in its resources on historical treaties, but no such treaties from Quebec: < <http://www.ainc-inac.gc.ca/al/hts/tgu/index-eng.asp> > , even though a list of resources about treaties in what became Quebec are provided elsewhere: < <http://www.ainc-inac.gc.ca/al/hts/res/rbi/qbc-eng.asp> > .

⁹⁰ French diplomatic relations with indigenous peoples are, however, well-represented in the literature on indigenous-settler relations. See, e.g., R White, *Middle Ground*, *supra* note 64 ; Gilles Havard, *The Great Peace of Montreal of 1701 : French-Native Diplomacy in the Seventeenth Century* (Montreal & Kingston : McGill-Queen's University Press, 2001); and, Gilles Havard, *Empire et Métissages: Indiens et Français dans le Pays d'en Haut, 1660-1715* (Sillery, Paris: Les Éditions du Septentrion et Presses de l'université de la Paris-Sorbonne, 2003).

⁹¹ Sébastien, Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Éditions Y. Blais, 1995), chpt. 1. Contrast Kenneth M Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1974) 38 Sask L Rev 123, who argues that ungranted, unceded lands within existing colonies and territories, such as Quebec, were subject to a similar reservation in favour of the Indians in spite of their geographic exception from the Indian provisions.

⁹² *Sioui*, *supra* note 1. The treaty in issue was made by General James Murray with the Huron of Lorette in 1760. For discussion of the treaty, see Miller, *Compact*, *supra* note 59 at 74-5 and *R v Côté*, [1996] 3 SCR 139 (The treaty right claim was based on a 1760 at Swegatchy and Caughnawaga between the Algonquins

Treaties) and the northeast corner (Treaty 8) can be connected to the larger treaty-making tradition through the significant history of fur trade relations there before settlers arrived.⁹³ Acknowledging this aspect of BC history refocuses attention away from the colonial policy-makers that set BC's Indian policy on a different trajectory from the rest of the western Canada to an older tradition of negotiated trading relationships.

Miller's inclusion of the fur trade era builds on the remarks of numerous historians who argue that relations between indigenous and European fur traders in the 100-200 years preceding treaties set the stage for at least the numbered treaty negotiations. Sidney Haring, for example, has related the fur trade era to First Nations understanding of treaties as sharing agreements, noting that "[t]here are substantial oral histories of Native understanding of these treaties. Most of them can be corroborated by the logic of the time. It must be clear, for example, that, having shared the Prairies with Euro-Canadian fur traders for two hundred years, Native people must have seen the treaties as recognizing that pre-existing relationship."⁹⁴ Arthur Ray, Jim Miller and Frank Tough expand this argument, suggesting that pre-treaty fur trade practices provide an

and the British. The Supreme Court declined to determine whether this treaty gave rise to a treaty right (at para 88)).

⁹³ See Duane Thomson & Marianne Ignace, "They Made Themselves Our Guests": Power Relationships in the Interior Plateau Region of the Cordillera in the Fur Trade" (2005) Summer: 146 BC Studies 3 [Thomson & Ignace].

⁹⁴ Haring, "No Recognized Law", *supra* note 67 at 102.

essential baseline against which to understand the numbered treaties.⁹⁵ As Arthur Ray explains:

The fur-trading institutions and practices that cemented this relationship, particularly the gift-giving and negotiating traditions and the treaties that Canada had already negotiated to the east in the area of present-day Ontario..., served as models for treaty negotiations in the 1870s... As a result, the treaties included provisions that had been central features of the classic, pre-1870s fur trade.⁹⁶

In addition to the gift-giving and negotiating traditions noted by Ray, the central features of the trading regimes emphasized by these authors as connecting to the later treaties include the rights to access lands and resources that indigenous peoples granted their European and Canadian trading partners,⁹⁷ the practices of recognizing trading chiefs with gifts of clothing and pipe ceremonies,⁹⁸ and the practices around sharing medicines

⁹⁵ Arthur J. Ray, Jim Miller & Frank J. Tough, *Bounty and Benevolence: A Documentary History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 3 [*Bounty and Benevolence*].

⁹⁶ Arthur J. Ray, *Telling it to the Judge. Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011) at 69 [Ray, *Telling it*]. Ray (*ibid.* at 87) notes that Teitelbaum J did not address this argument in his dismissal of the land sharing arguments put forward by Samson Indian Band and Nation in *Victor Buffalo v Canada*, 2005 FC 1622, [2006] 1 CNLR 100 [*Victor Buffalo*], appeals dismissed, *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415, [2007] 3 FCR 245, and 2009 SCC 9, [2009] 1 SCR 222 (on appeal, the case was joined with a related action brought by the Ermineskin Indian Band and Nation and focused on claims that the federal Crown had breached its obligations in managing funds earned from oil and gas royalties).

⁹⁷ *Bounty and Benevolence*, *supra* note 95, chpt 1. See also Long, *Treaty 9*, *supra* note 36, chpt 1; Thomson & Ignace, *supra* note 93; and Janna Promislow, "It would only be just": A Study of Territoriality and Trading Posts Along the Mackenzie River, 1800-1827" in Lisa Ford & Tim Rowse, eds., *Between Indigenous and Settler Governance* (London & New York: Routledge, 2012) 35 [Promislow, "It would only be just"].

⁹⁸ *Bounty and Benevolence*, *ibid.* See also Long, *Treaty 9*, *ibid.*, and Janna Promislow, "One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert's Land and the North-West Territories" in Hamar Foster, Benjamin L. Berger, & A.R. Buck, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 55 [Promislow, "One Chief, Two Chiefs"].

and assisting each other in dealing with illness, which have a particular correspondence with the written medicine chest provision of Treaty 6.⁹⁹

In a slightly different take on how the fur trade relates to treaties, John Foster suggested that the relationship constituted a “compact” between the traders.¹⁰⁰ Similarly, Jean Friesen described the relationship formed through trade, which she identifies as a political and diplomatic act, as a form of alliance, as “*treaty* trade, an institution of Indian origin [that] served both trader and Indian.”¹⁰¹ This argument emphasizes the negotiated form of the relationship that supported the trade as a form of treaty itself.¹⁰² It also might be taken to reflect the “contracts” and “leagues of friendship and peaceable cohabitation” that the Hudson’s Bay Company instructed its earliest traders to make with the natives of the lands in which they wanted to settle a trade and, if possible, purchase the lands.¹⁰³ The significance of these early treaty-trade relationships in Rupert’s Land was not simply the establishment of good relations with trading partners; the English traders also needed

⁹⁹ *Bounty and Benevolence*, *ibid.* at 8. There are other specific terms in the treaties which might be connected, in a similar manner, to fur trade practices. For example, indigenous traders were “outfitted” annually with the equipment for their fall and winter hunting and trapping needs and Treaties 4 through 11 included written terms securing gifts of ammunition and/or twine to support their hunting, fishing and trapping activities. Educational promises and provisions regarding famine relief might also be explored. Regarding the latter, see *ibid.* at 138-9.

¹⁰⁰ John E. Foster, “Indian-White Relations in the Prairie West during the Fur Trade Period - A Compact?” in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: University of Alberta Press, 1999 [1979]) 181.

¹⁰¹ Friesen, *supra* note 61 at 44.

¹⁰² See Janna Promislow, “‘*Thou wilt not die of hunger ... for I bring thee merchandise*’: Consent, Intersocietal Normativity and the Exchange of Food at York Factory, 1682-1763” in Jeremy Webber & Colin Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 77 [Promislow, “I bring thee merchandise”].

¹⁰³ Discussed in *Bounty and Benevolence*, *supra* note 95 at 4; Miller, *Compact*, *supra* note 59 at 12-14, and Promislow, “I bring thee merchandise”, *ibid.* at 86-7.

their alliances with local peoples for colonial/military purposes (as in Mi'mak'i/Acadia), to gain a foothold in the vast territories in which French traders were also present. Indeed, the Hudson's Bay Company relied on its "leagues of friendship" in legal disputes with the French over Rupert's Land leading up to the Treaty of Utrecht, 1713.¹⁰⁴ In the end result, both of these arguments – fur trade as essential context and source of insights into a set of relations that would have influenced at least First Nations expectations of treaty, and fur trade relationships as involving and embodying (peace and friendship) treaties themselves – bring the fur trade into treaty history. And regardless of which argument prevails, both importantly suggest that treaty-making is an iterative process, in which earlier relationships shape what is possible and desirable when the time comes to reformulate and rearticulate the terms of relationship.

Less novel than including fur trade compacts, but equally significant in treaty-making histories, is Miller's inclusion of the post-1975 comprehensive claims process in his account.¹⁰⁵ Linking historical traditions to contemporary developments is important for understanding the context for contemporary negotiations processes and for legal argument, as courts begin to grapple with the interpretive frame to bring to so-called modern treaties.¹⁰⁶ However, there is room to consider what connects the eras beyond the

¹⁰⁴ Promislow, "I bring thee merchandise", *ibid.* at 87 and footnote 44.

¹⁰⁵ Miller, *Compact*, *supra* note 59. See also Foster, "Indian Administration", and CLG, *supra* note 72.

¹⁰⁶ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks First Nation*]; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 SCR 557, and *Eastmain Band v Robinson* (1992), 99 DLR (4th) 16 (Fed CA), lv. to appeal refused, [1993] 3 SCR vi (SCC). In Special Rapporteur Miguel Alfonso Martinez's report for the UN, he avoids the term "treaties" in

fact of official treaty-making activities. For example, the delineation of modern versus historic, is consistently demarcated by Miller and others by a 50-year gap between the Williams Treaty of 1923 and the James Bay Accord of 1975, which overlooks adhesions that took place during these 50 years: Saulteux, Cree and Chippewa (Ojibway) bands signed adhesions to Treaty 6 between 1944 and 1956; Treaty 9 was significantly expanded by an adhesion in 1930, after the boundaries of Ontario were extended in 1912.¹⁰⁷ These adhesions extended existing agreements to new nations and, occasionally, new territories. Overlooking them as part of treaty history also overlooks the motivations and perspectives of the new treaty peoples in favour of colonial attitudes during this period, which assumed Indian polities were a fading artifact of the past and that treaties, once signed, required little further attention.¹⁰⁸

naming what are commonly identified in Canada as modern treaties, preferring instead to call them “constructive arrangements”. This language choice signals the Rapporteur’s view of these agreements as wholly domestic nature and limited in terms of the reach of the negotiations (capable of establishing only delegated governmental powers), in contradistinction to the constitutional nature and international status of historic treaties which, in his assessment, were recognized under the Law of Nations: *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* (UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999) at para 145 [Martinez, *UN Report*]. While I’m sympathetic to the Rapporteur’s concerns about the hegemonic frame within which “so-called” modern treaties are negotiated, my approach in this paper is to take an expansive view of treaties, bringing a variety of forms of negotiation under the umbrella of treaties rather than being concerned to identify a particular form or scope of agreement that may be called a treaty. As a result, my reference to “so-called” is intended to signal concerns regarding the categorization of “modern” rather than “treaty”.

¹⁰⁷James Morrison, “Treaty Research Report – Treaty No. 9” (1986), prepared for the Treaties and Historical Research Centre, Indian and Northern Affairs Canada, online: < <http://www.aadnc-aandc.gc.ca/eng/1100100028859>>.

¹⁰⁸ Morrison, *ibid.*, notes that the Treaty 9 adhesions were motivated in part by the need for bands to split into smaller units than the treaty bands created in 1905, to suit the government’s reserve policy and to reflect the traditional hunting band’s hunting groups. For some discussion regarding Treaty 9 adhesions, see Long, *Treaty 9*, *supra* note 36 at 84-91. The adhesion of the McLeod Lake Indian Band to Treaty 8 in

Modern treaties are not simply distinguished from historic treaties by chronology; they are also differentiated by their scope and conditions of negotiation, or so it is generally presumed. As Binnie J recently emphasized in *Little Salmon/Carmacks First Nation*:

Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties....The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties ... and post-Confederation treaties ... The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous.... Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975)... were...intended to create some precision around property and governance rights and obligations.¹⁰⁹

Justice Deschamps provided a different view in her concurring reasons, rejecting the date of signature of a treaty or categorization of treaty type as determining the interpretive approach that should be taken, noting that s. 35 does not differentiate between treaties in this manner, and “that it would be wrong to think that the negotiating power of Aboriginal peoples is directly related to the time period in which the treaty was concluded.”¹¹⁰ On closer examination, and with respect for Binnie J’s clear desire to launch a new and better era of aboriginal-Crown relations, Deschamps J’s view of the evolution of treaty-making has greater correspondence with the historical record.

2000 is also a challenging case to fit into the standard understanding of the split between modern and historic; see *Irwin*, *supra* note 69.

¹⁰⁹ *Ibid.* at paras 9 and 12.

¹¹⁰ At para 116. UN Special Rapporteur Miguel Alfonso Martinez noted in his 1999 report numerous conditions around the negotiation of the James Bay Agreement that give rise to concerns about the consensual nature of that agreement: Martinez, *UN Report*, *supra* note 106 at paras 137-8.

As noted above, some interpretations of eighteenth-century treaties, such as Wicken's interpretation of the 1726 Mi'kmaq-British treaty, demonstrate intentions to create norms of co-existence around "property and governance rights and obligations," even if such norms were not defined precisely.¹¹¹ The difficulty of reaching such interpretations of the treaty through the historical record, rather than from the written terms of the treaty, does not erase this historical content. Consider also self-government. The federal government's now dated 1995 policy on self-government considers such negotiations to be an "add-on" to historic treaties, stating specifically that historic treaties will not be re-opened.¹¹² Indigenous scholars, on the other hand, have argued that treaties were agreements between sovereign political communities, a fact that implies recognition of First Nations self-government and supports s. 35 treaty self-government rights.¹¹³ Modern treaties, by contrast, make self-governance rights explicit in their written terms, institutionalizing and protecting various forms or pieces of indigenous governance or joint indigenous-public government decision-making. The difference may again be primarily between written (modern) versus unwritten terms (historic), with lingering disputes about the scope of the historic treaties. Moreover, the detailing of self-government jurisdictions and institutions in the modern agreements coincides with the growing complexity of the modern administrative state. Is the detailed nature of the self-

¹¹¹ See also Promislow, "It would only be just", *supra* note 98.

¹¹² *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, online: < <http://www.aadnc-aandc.gc.ca/eng/1100100031843#ext> >

¹¹³ See, e.g., Henderson 1994, *supra* 3; Ladner, *supra* note 16.

government provisions a reflection more of the changing nature of treaties or of the changing nature of government?¹¹⁴ If we also take into account the significant federal policy changes around the parameters of self-government negotiations in the modern era,¹¹⁵ we might see that at least the early twentieth-century northern resource development treaties (Treaties 8-11) as having more in common with the treaties of the 1970s through the early 1990s than the typical division between modern and historic treaties suggests.

One final concern about how the modern treaty era has been presented in treaty surveys to date is the adherence to official federal treaty policies and processes in how treaties are characterized.¹¹⁶ Many historians recognize treaty-making experience as inclusive of “informal” treaty processes, exemplified by the authors noted above connecting fur trade practices to treaty histories.¹¹⁷ Many constitutional theorists

¹¹⁴ One might compare the shift to the *Constitution Act, 1867* and note how little was specified in the text about how the provincial and federal governments might work together, amongst other things. Does this absence mean the *Constitution Act, 1867* is unsophisticated?

¹¹⁵ From limited co-management arrangements (James Bay, 1975; Gwich'in and Sahtu, 1993 and 1994 respectively) to independent legislative bodies (Nisga'a, 1998; Tli'Cho, 2005). For an overview of the comprehensive land claims process, see Christopher Alcantara, “To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada” (2007) 38 *Publius. The Journal of Federalism* 343.

¹¹⁶ See, e.g., Miller, *Compact*, *supra* note 59 and Foster, “Indian Administration”, *supra* note 72. Many of the developments discussed in this paragraph are very recent, following after *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]. It may be sometime before they become absorbed into survey examinations of modern treaty-making.

¹¹⁷ For a related exploration in relation to New Zealand, see Richard P Boast, “Recognising Multi-Textualism: Rethinking New Zealand's Legal History” (2006) 37 *Victoria Univ. Wellington L. Rev.* 547 [Boast, “Multi-Textualism”]. Although Boast's exploration focusses on written agreements, his analysis points out how exclusive attention to the Treaty of Waitangi misses other important agreements, particularly from Maori perspectives, that also serve as “foundation[s] of relationships with the New

recognize a broad idea of “treaty processes,” as discussed in the first section of this paper. Even the Supreme Court has recognized the connections, when in *Mikisew Cree First Nation v Canada (Minister of Heritage)*¹¹⁸ Binnie J commented that the duty to consult applies to the implementation of the Crown’s rights to take up land for settlement and other purposes under Treaty 8.¹¹⁹ Thus processes beyond the treaties, such as consultation, are required to make the treaty work. Meanwhile, a plethora of quasi-treaty agreements and processes have cropped up, particularly at the provincial level.¹²⁰ British Columbia’s policies embrace “incremental treaty agreements,”¹²¹ which focus on sharing economic benefits with First Nations and building trust before final agreements are reached. These policies also embrace “reconciliation protocols and agreements,”¹²² some of which notably establish shared decision-making around lands and resources. Neither the BC treaty process nor these developments can be understood in isolation; they exist only in relation to each other and the ongoing rejection or complaints about the BC treaty

Zealand State that endure to this day and a benchmark by which the Crown’s behavior can be evaluated” (at 572).

¹¹⁸ *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*]

¹¹⁹ *Ibid* at para 33.

¹²⁰ See, e.g., relationship and revenue sharing agreements such as Quebec’s Paix des Braves; online < <http://www.gcc.ca/issues/paixdesbraves.php> >. Regarding enforceability issues, and in the context of agreements with Métis, see Jean Teillet, “A Tale of Two Agreements: Implementing Section 52(1) Remedies for the Violation of Métis Harvesting Rights” in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) 333.

¹²¹ Online: < http://www.gov.bc.ca/arr/treaty/incremental_treaty_agreements/default.html >.

¹²² Online: < http://www.newrelationship.gov.bc.ca/agreements_and_leg/reconciliation.html >.

process by many First Nations and other commentators.¹²³ Provincial leadership in this area is itself worth noting, and marks perhaps the greatest departure of the modern from the historic eras (although, at the same time, continuing the tradition of federal-provincial policy differences around treaty-making).¹²⁴ These developments suggest that consultation and various other forms of agreements need to be considered alongside negotiations under federal comprehensive and specific claims policies (and the BC Treaty Process), in order to paint a full picture of the broad fields of consent and dissent that characterize the modern era of treaty-making in Canada.

Thus, even under Miller's expanded approach, the surveys that give a basic shape to Canada's treaty-making history carry forward the historiographical habits of previous generations. Most critically, the distinctions between eras and types of treaties in the surveys correspond to the colonial administration's interests in making a treaty in a particular time and place (peace and alliance or land or "precision" around land and government) and inadequately represent indigenous perspectives. Of course, if the aim of the survey is to present a snapshot of colonial policy over time, this emphasis is appropriate.¹²⁵ However, if the aim of the survey is to provide a birds-eye view of

¹²³ See Browne and Lornie Report, *supra* note 44. See also *Hul'qumi'num Treaty Group v Canada*, Organization of American States Inter-American Commission on Human Rights, Case No. 12.374, Report on Admissibility No. 105/09, online: < <http://www.law.arizona.edu/depts/iplp/international/htg/documents/HTG%20v.%20Canada%20Admissibility%20report%20Petition%20592> > and Andrew Woolford, "Transition and Transposition: Genocide, Land and the British Columbia Treaty Process" (2011) 4 J of Marxism and Interdisciplinary Inquiry 67.

¹²⁴ For a summary, see Sprague, *supra* note 71.

¹²⁵ See, e.g., Foster, "Indian Administration", *supra* note 72.

Canada's treaty-making traditions, then such approaches are inadequate for presenting a history comprised of both indigenous and Crown experience. The over-representation of colonial interests is particularly strong in the continued separation of land from peace and friendship treaties and/or fur trade agreements.¹²⁶ Many indigenous groups claim that, in spite of the surrender clauses in the text in the land cession treaties, they never 'sold' their land. This claim is anchored in indigenous beliefs and economic systems, in which land is not a commodity that can be sold. Instead, they claim that they agreed to share their territories and resources with the newcomers.¹²⁷ And while these claims are advanced in the present day, there are at least some examples of contestation around ownership of land in the historical record as well.¹²⁸

The interpretive divide between sharing and cession has been taken up by several historians, particularly those concerned with bringing indigenous perspectives and contributions to treaty-making to the fore. They question the historical grounding of such

¹²⁶ Noted by Martinez, *UN Report*, *supra* note 110 at para 122.

¹²⁷ See, e.g., RCAP Report, vol 2, *supra* note 3 at 45; *Treaty 7*, *supra* note 3; R.J. Surtees, *Indian Land Surrenders in Ontario 1763–1867* (Ottawa: Indian and Northern Affairs Canada, 1984) at 10; and Sharon Venne, "Treaties Made in Good Faith" in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) 1-16. For discussion of these claims in the treaty jurisprudence, see footnote 134 and accompanying text below.

¹²⁸ For example, the treaty records from Treaty 1 and 3 include requests for compensation for lands and resources and Treaty 4 includes discussion of grievances with the Hudson's Bay Company, including the Company's sale of the territory to the Dominion. See Friesen, *supra* note 61. For the Treaty 4 record, see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Calgary: Fifth House, 1991; first published 1880) at 99-107.

claims. Jean Friesen, for example, states that even in light of the unbalanced conditions in which the 1871-1877 treaties were negotiated, or perhaps because of them,

There is no doubt in my mind that at least some of the Indian leaders at the treaties were well aware that this was a land sale on an enormous scale...Most writers have assumed either that Indians could not conceive of the sale of 'Mother earth' or that they only applied the concept of land *use* rather than ownership and sale. While this may be true for some Indians in some parts of the west, it seems more likely that, like the Iroquois in the eighteenth century, they may have been developing a variety of conceptual approaches to land and resources, depending upon whether they were dealing within the tribe, with other Indians, or with Europeans.¹²⁹

Sidney Haring also considered the prairie treaties and wrote that, in general, "[t]he concept of the sale of land and its permanent alienation cannot have been known to Indians who never held private property.... The First Nations understood the treaties as peace and friendship agreements, with specific cessions on some land use rights in return for payments in cash and goods from the Crown."¹³⁰ Nevertheless, in discussing problems of translation, and the difficulties this creates for historical interpretation, Haring further stated that:

It is impossible to fully articulate the Indian understanding of these treaties. Part of the evidence is contradictory. For example, the Indians at Fort Carlton, according to official documents, discussed leasing their land to the whites for four years rather than selling the land. This discussion itself would indicate that the tribes understood that they were selling the land. But that assumes Indians knew what a lease was. Other Indians counseled against selling the land, again indicating that the tribes knew they were discussing a land sale. The final

¹²⁹ Friesen, *supra* note 61 at 43 and 49 (emphasis in original).

¹³⁰ Haring, *supra* note 67 at 102.

language [of the surrender clauses] seems unambiguous. But it is boilerplate language, inserted in all the treaties, and it is not clear how it was translated.¹³¹

Inevitably, the historian's conclusion is that the historical "truth" of the competing claims depends on the context – the particular knowledge and experience of the peoples involved, their languages, legal cultures and knowledge of those of their negotiating partners, and the larger social, political, and economic context in which the treaty was negotiated. Moreover, as Haring suggests, the nature of the historical record rarely permits conclusive interpretations of the sort demanded by legal standards on matters of dispute. As noted earlier, a historian's interpretation may simply be that the meaning of a given treaty was *not shared* between the parties – a perfectly valid conclusion by historical standards.

Looking for points of mutual agreement as represented by treaty terms and texts is an inquiry (im)posed by law, in which the historical inquiry serves or follows from the legal one. Although the historiography of treaties now reflects mixed legal and historical orientations, historians have traditionally been more concerned with portraying the overall context and character of a particular treaty or regional set of treaty negotiations, or with the development and practice of colonial policy around treaties. They have formulated their questions against intellectual developments such as attending to the agency of indigenous peoples in colonial contexts and theoretical debates about the

¹³¹ *Ibid.* at 104-5.

nature of objectivity and positive historical facts. Legal questions, by contrast, stem from an abstracted and normative concept of treaties and treaty rights. A historical interpretation of a lack of shared meaning in relation to a given treaty raises legal issues, but not necessarily historical ones. And the legal issues raised are potentially fundamental: if the parties never reached an agreement on important terms, is it appropriate to speak of a treaty having been reached?¹³²

To date, the interpretive gulf between sharing and cession has not led parties to litigate claims that no treaty was formed, perhaps in part because such arguments would do little to advance First Nations interests.¹³³ Instead, the Samson Indian Band and Nation, for example, disputed the scope and meaning of only the land cession clause in the *Victor Buffalo* case, arguing that Treaty 6 was treaty of alliance rather than land cession.¹³⁴ Justice Teitelbaum rejected their argument. Without addressing whether the Samson Indian Band and Nation's characterization of the treaty was 'right', we can notice that succeeding in their claim required more than proving their specific case. Succeeding required that Teitelbaum J accept a more fundamental re-configuration of the

¹³² See Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001) 33 *Ottawa Law Review* 301 at 306 [McNeil, "Extinguishment"].

¹³³ But note that Saskatchewan Elders have expressed the view that substantial agreement was reached at treaty negotiations and so, according to Harold Cardinal and Walter Hildebrant, what is at issue "is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented." (Harold Cardinal & Walter Hildebrant, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 59). Donald Purich notes that there has been one challenge to the formation of a treaty that failed at the appeal level but does not identify the case (Purich, *supra* note 70 at 110).

¹³⁴ *Victor Buffalo*, *supra* note 96. Justice Teitelbaum rejected their contention based on the evidence he heard and his strong preference for the experts that relied on the written record (*ibid.* at paras 20, 451-532). For discussion, see Arthur J. Ray, *Telling It*, *supra* note 96 at 85-87.

basic layout of treaty history in Canada which instructs that, by its nature, Treaty 6 was a land cession treaty. While these labels hold no legal significance (as noted by Deschamps J in *Little Salmon/Carmacks*), and strong facts should overcome prejudicial academic descriptions, a narrative of treaties that does not summarily preclude the Samson Indian Band's argument would help set the bar a little lower. Moreover, a survey of treaty-making in Canada should be capable of accommodating the interpretive dispute that the Samson Indian Band and Nation put before the Federal Court and claimed by many other First Nations. This dispute characterizes the history of Canadian treaty-making as much as the treaties themselves.

The need to re-shape treaty surveys to encompass both agreements and persistent disagreements, draws attention to the strong connections between law and history in this area. Consider John Borrows' argument that the Royal Proclamation is best understood as part of the Treaty of Niagara of 1764, such that the text of the Proclamation should be read in concert with First Nations understandings of the Proclamation upon which the Treaty of Niagara is premised and as memorialized by the wampum belts presented by the Crown to the nations gathered at Niagara.¹³⁵ This argument received a measure of

¹³⁵“Wampum at Niagara: the Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155. See also J. R. Miller, “Compact, Contract, Covenant: The Evolution of Indian Treaty Making” in Ted Binnema and Susan Neylan, eds, *New Histories for Old: Changing Perspectives on Canada's Native Pasts* (Vancouver: UBC Press, 2007) 66 at 78-79 (regarding documentary evidence that may support Borrows' historical claim).

recognition in the *Chippewas of Sarnia* case at the trial level,¹³⁶ but, in general, the Royal Proclamation continues to be interpreted as a stand-alone and unilateral legal instrument.¹³⁷ And although the Treaty of Niagara is recognized to be part of treaty history, Borrows' argument demands that indigenous law and perspectives be taken seriously as part of official history, even if in contradiction to historical evidence regarding the Crown's actions and motivations. Borrows' argument is not that the Crown viewed the Royal Proclamation's legal force as dependent on First Nations' consent at the Treaty of Niagara, but that the Royal Proclamation is not a legitimate source of Crown authority without their agreement. It is an argument that is simultaneously historical and legal: historical in its presentation of First Nations understandings of the Proclamation as embodied in the Treaty of Niagara, and legal in its argument that First Nations' understandings, premised on their own legal systems, are significant to the continuing normative import of the Proclamation. The issue of under-inclusion thus

¹³⁶In his reasons on the summary judgment hearing, Justice Campbell wrote: "The Royal Proclamation was publicly advanced by the Crown to the Indians as the basis of its Indian policy. This declaration of policy, at first unilateral, soon came to be relied upon [by] the Indians and it became a mutually recognized and fundamental element of the treaty relationship" (*Chippewas of Sarnia* (trial), *supra* note 84).

¹³⁷ See, for *e.g.*, the Court of Appeal's more muted statement in the same case: "After setting out its policy in the Royal Proclamation, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the Royal Proclamation would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara... The singular significance of the Royal Proclamation to the First Nations can be traced to this extraordinary assembly and the treaty it produced." (*Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), [2000] OJ No 4804 at para. 54, 195 DLR (4th) 135, [2001] 1 CNLR 56 (Ont CA)). See also Justice Linden's approach in the *Report of the Ipperwash Inquiry*, vol. 2 (2007) at 45-46, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_CH03.pdf.

shifts: Given the potential disagreements with Borrows' argument about the legal significance of the Treaty of Niagara, how and when should disagreements about the legal significance of that treaty be included within histories of treaties?

This question highlights the difficulty separating the historical view from the legal view in this arena. The identification of treaties in history begins from a view of what treaties are. That view is likely informed by the historical record itself – what “appears” to be a treaty based on the parties reported actions and words at the time. If historicism is the goal, then historians should rely on the historical understanding of what treaties were, including their legal and political significance, at the time the agreement was forged. If the inquiry is sparked by a legal case, then the historical narrative will respond to what present legal standards demand of treaties. In either approach, however, views of what constitutes a treaty and its legal significance are ultimately filtered through or contrasted with ideas of treaty in the present. And in either the historical and present-day legal view of treaties, the question of “whose law?” and “whose history?” must be part of the inquiry, requiring attention to potential differences between what indigenous and Euro-Canadian traditions identify as treaties as well as their content and import.

Indigenous languages, as reviewed in the previous section, illustrate the legal aspect of the issue, particularly the resources within indigenous languages (presumably historical as well as contemporary) for describing different forms of agreement and

distinguishing between changeable and permanent aspects of treaty relationships.¹³⁸ Less examined is the variation and evolution of the meaning of treaties in English traditions. Patricia Seed notes that the word treaty in English “has an historically distinctive meaning compared to other European languages.”¹³⁹ Where in other European languages, treaty comes from the word meaning dealing with someone face to face or personally, English was alone in that

treaty also signified *writing*. From the fourteenth century, when the word first appeared in English, until the middle of the seventeenth century, ‘treaty’ primarily meant a form of inscription: a story, narrative, written account, treating a subject in writing. As a result, any *written* agreement between two English subjects could and indeed was called a treaty, not just an agreement between states (*Oxford English Dictionary*). Hence, while the earliest written agreements between English colonists and Native Americans were called treaties, at the time this word simply referred to the fact that the agreement (between individuals) was written down. The 1621 pact between Massasoit, leader of the Pokanoket near the Plymouth colony, was labelled a treaty at the time. But that word does not necessarily mean an accord between nations or political authorities but only an agreement written on paper.¹⁴⁰

Seed’s observation confirms that the nature, or even presence, of politics behind seventeenth-century agreements cannot be assumed. Further, while the term treaty potentially signified differently in history, it was also not the only word used to describe what treaty surveys generally label as treaties today (although Miller takes care to bring in other descriptors – compacts, contracts and covenants). As noted earlier, the Hudson’s Bay Company instructed its officers to form “compacts” and to purchase their lands and

¹³⁸ See discussion above, with text accompanying notes 36 to 41.

¹³⁹ Seed, *supra* note 66 at 20.

¹⁴⁰ *Ibid.* at 21.

rivers of the indigenous peoples they encountered in accordance with their traditions. If purchase was not possible, officers were instructed to at least secure a “league of friendship and peaceable cohabitation” and the freedom to trade.¹⁴¹ Other seventeenth- and eighteenth-century sources confirm that, in this era, the emphasis was on the desired relationship or aim – peace, amity, alliance, protection, friendship, trade, subjecthood – rather than on the form of ‘treaty’ used to achieve it.¹⁴² Later in fur trade country, the language of “settling a trade” described the seemingly more limited aims of the European trading companies when they sought out new trading partners and wanted to establish a trading post within their territories.¹⁴³

Because the word ‘treaty’ carries status in international and domestic law, both historically and contemporarily, the inclusive approach advocated for in this paper raises concerns about spreading that status thin and miscommunicating the legal significance of an agreement by artificially labeling all forms of agreements as treaties.¹⁴⁴ There is merit to considering what moments of agreement ‘deserve’ the label treaty from both historical and contemporary perspectives. The aim of this discussion, however, is to make sure the variations within the different cultural and temporal conceptions of treaties –between

¹⁴¹ “Letter to John Nixon” (21 May 1680) in See E.E. Rich, ed., *Copy-book of Letters Outward &c. Begins 29th May, 1680 Ends 5 July, 1687* (Toronto: Champlain Society, 1948) at 9 and “Letter to John Bridgar” (15 May 1682) in *ibid* at 36.

¹⁴² See Mark Walters discussion of terms used in statutes from colonial America: Mark D. Walters, “*Mohegan Indians v Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33 Osgoode Hall L. J. 785 [Walters, “*Mohegan*”] at 793-795.

¹⁴³ See Promislow, “It would only be just”, *supra* note 98 for discussion of the terms of settling a trade under the North West Company, which had no British colonial mandate comparable to the HBC.

¹⁴⁴ For discussion see Boast, *supra* note 117 and Martinez, *UN Report*, *supra* note 110.

fixed and variable agreements or aspects of agreements; between peace, alliance, and subjecthood; between written and oral – are accommodated within surveys of treaty-making experience. Such debates belong within treaty histories, but should not set boundaries around the proper field of inquiry or preemptively situate a given agreement within a particular category of treaties.

The second question, “whose history?” should also give us pause. Up to this point in the paper I have blithely assumed readers would understand my references to ‘history’ to mean ‘academic history’. Academic history is by no means a narrow field. It has been broadened by new methodologies such as ethnohistory and the value of historicist expositions of the past have been challenged by intellectual movements, such as post-structuralism, sub-altern and post-colonial and settler-colonial studies, as well as the emergence of memory, all of which question the scope for objectivity, attack positivist methodologies, and challenge the dominant linear, pointillist concept of time.¹⁴⁵ Oral histories (not indigenous oral histories specifically) have played a significant role in these developments in democratizing the field of history, allowing for ground-up perspectives

¹⁴⁵ See discussion in Richard White, “Using the Past: History and Native American Studies” in Russell Thornton, ed., *Studying Native America: Problems and Prospects* (Madison: University of Wisconsin Press, 1998) 217; Gabrielle M. Spiegel, “Memory and History: Liturgical Time and Historical Time” (2002) 41:2 *History and Theory* 149 [Speigel]; Edward Cavanagh, “History, Time and the Indigenist Critique” (2012) 37 *Arena Journal* 16 [Cavanagh, “History”]; and Bain Attwood, “In the Age of Testimony: The Stolen Generations Narrative, “Distance,” and Public History” (2005) 20 *Public Culture* 75 [Attwood]. It should be noted that within academic history, there is also a strong tradition of acknowledging the non-positivist nature of historical interpretation and the influence or incorporation of the present within historical inquiry even if such approaches do not answer post-structural critiques; see, e.g., Lawrence Stone, “History and Post-modernism, III” (1992) 135 *Past and Present* 189; and Edward Carr, *What is History* (New York: Vintage Books, 1961).

to also be viewed as authoritative. As Dipesh Chakrabarty has explained, the discipline of history is only one way among many of remembering the past.¹⁴⁶ Of particular interest for our purposes are the different temporalities contained within different approaches to history. Memory and many forms of oral history emphasize experience and the presence of the past today, while academic or traditional historical scholarship insists on drawing a line, on keeping “the past in the past.”¹⁴⁷ The historicism of academic history demands an exploration of the specificity of the past as a ‘foreign country’, which boasts the advantage of having “a greater capacity than ‘memory’ to provide other ways of seeing the world.”¹⁴⁸

Reliance on indigenous oral histories attracts and exemplifies these debates and concerns. Like memory as a historical discipline, the reliability of indigenous oral histories, particularly the potential or tendency of oral histories to “telescope” chronologies, has been challenged in both academic and legal forums. But, as many have pointed out, there are many forms of recalling the past caught by the term ‘oral history’, and they are not all equal in how they remember the past or in their sense of historicism.¹⁴⁹ Nevertheless, indigenous oral histories often exhibit a different truth claim

¹⁴⁶ Dipesh Chakrabarty, *Provincializing Europe Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000).

¹⁴⁷ Spiegel, *supra* note 145 at 149.

¹⁴⁸ Attwood, *supra* note 145 at 90.

¹⁴⁹ Bruce Granville Miller, *Oral History on Trial. Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) at 26 [B Miller]; Julie Cruikshank, “Oral Tradition and Oral History: Reviewing Some Issues” (1999) 3 *Canadian Historical Review* 403; and Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” (2005) 20 *Canadian J. of Law & Society* 123.

than those put forward by traditional academics history. In particular, oral traditions are similar to law in that they often involve an element of moral evaluation as part and parcel of the claims of historical truth.¹⁵⁰

iii. Better approaches to treaty histories?

Above, I canvassed problems in survey presentations of treaty history in Canada, and argued that treaty histories should be inclusive of more eras and geography as well as different historical methodologies and legal traditions. I have emphasized that in order to move beyond colonial perspectives in treaty-histories, typologies and chronologies must not obscure ongoing disputes regarding treaty meanings. By contrast, I have presented disputed meanings as central to Canada's treaty-making experience – a corrective on legally-oriented narratives that emphasize treaties as settled forms of coexistence, the true meanings of which just need to be recovered in the present. I have also argued that fur trade history and the explosion of contemporary quasi-treaties also belong in our overall picture of treaty history, even if not all agreements in such environments merit the legal status of treaties on their own. From such starting points, treaties become a matter of

¹⁵⁰ Napoleon argues that what is in issue in courts' problematic reception in courts is the presence of two competing legal systems (Napoleon, *ibid*). In court settings, oral histories are treated as (problematic) forms of history not law. Bruce Miller draws a different connection between truth in oral history and truth in law. He notes similarities between legal standards of objectivity in fact-finding (particularly the reasonable man) and some forms of oral history in that they both rely on a community standard employed in determining the 'truth' (B. Miller, *ibid* at 37-8). See also Lori Ann Roness and Kent McNeil "Legalizing Oral History: Proving Aboriginal Title in Canadian Courts" (2000) 39 *Journal of the West* 6, who discuss the difficulties of introducing oral evidence to support aboriginal rights claims in court in light of the structural and cultural limitations of court processes that cannot properly accommodate the cosmologies that inform oral histories.

incremental agreement, an iterative process of arriving at a working relationship and adjusting to changes of circumstance. Bringing such approaches into surveys of treaty-making would better align survey histories with the constitutional narratives described in the first section, and would also provide a more accurate and fulsome picture of the experience of treaty-making in Canada over time.

With an account of treaties grounded in an iterative development of relationships and arrangements for co-existence, we can imagine a different organizing principle for attempting to encapsulate our treaty history in short, survey forms. Within a continuum of treaty-making, what distinguishes some treaties or agreements from others is the degree of departure from previous relationships and agreements. The question to ask in classifying the nature of a treaty is whether it was a turning point or a continuation of the relationship. Dorothy Jones provided this sort of analysis in her assessment of eighteenth-century American treaties, noting that by mid-century, there were two primary forms of agreement: “belligerency treaties.... in which the chief purpose was to mark the end of hostilities by exchanging prisoners and so on; and accommodation treaties, in which the terms of coexistence were given formal expression.”¹⁵¹ In other words, the treaties either changed the nature of the relationship by arriving at terms of peace, or the treaties clarified and supported the peaceful coexistence that was already in place.

¹⁵¹ Jones, *License*, *supra* note 66 at 93.

Such an approach does not imply that categorization along such lines would be easy. The historical experts in the *Marshall* litigation, for example, disagreed on exactly this question. Relying more on Mi'kmaq perspectives, William Wicken argued that in the context of the relationship between the Mi'kmaq and the British, the 1760-61 treaty in issue in the case must be interpreted in relation to the terms of an earlier treaty from 1726.¹⁵² His argument was that the 1760-61 agreements were a renewal of the 1726 one. Stephen Patterson argued the opposite. Relying more on documentary evidence, he argued that the 1760-61 treaties renewed Mi'kmaq-British relations; that along with hostilities between 1726 and 1760, the 1760-61 treaties terminated and replaced the earlier agreement.¹⁵³ The 1726 treaty was still relevant in his argument, but as a baseline against which change can be evaluated. Such disagreements are productive, suggesting that how to organize and give a birds-eye view of treaty histories may be contentious. An approach based on questions of continuity and change highlights that how one defines the relevant context and baseline for a given treaty will impact its interpretation. It also emphasizes that, regardless of whether a given agreement is better characterized as a renewal of terms of coexistence or a new or sharper reorganization of the terms of coexistence, the arrangements that were in place before matter. Under such an approach, surveys may not be able to give very much shape to treaty histories, but they would better

¹⁵² Wicken, *Mi'kmaq Treaties*, *supra* note 77, chptr 9.

¹⁵³ Stephen E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 UNB Law J 41 at 62-63. For a discussion of this academic disagreement, see Douglas C Harris, "Historians and Courts: *R. v. Marshall* and *Mi'kmaq Treaties* on Trial" (2003) 18 Can. J. L. & Soc'y 123 at 124-5 [Harris, "Historians and Courts"].

convey the complexity and remarkable continuity of treaty-making in Canada without the colonial hangover.

3. Treaties in Law

Judicial consideration of treaties can be divided into three areas of concern: the status of treaties as constitutional events and related status of treaties as creating legally enforceable obligations; the definition of treaties recognized in law; and the interpretive approach taken to identifying treaty obligations that are, since 1982, protected as treaty rights. This section will discuss each of these dimensions of treaties in law in turn, beginning with the status of treaties as constitutional events, but with some unavoidable overlap between the three issues. The first dimension requires attention to doctrinal legal history, including debates about the enforceability of treaties at law. As Paul McHugh states, the task of the legal historian (with a historicist aim) goes beyond a sketch of what became the dominant doctrinal view:

Rather than having a monolithic and unified presence, law in the past (as law today) had a social and cultural setting that comprised and encompassed ‘many legalities’ that were dynamic sites of iteration and contestation, a collection of possibilities shaped by context, rather than chiselled finality. Legal ‘truth’ existed no more in the past, than it does in our present. The disinterested legal historian's task, then, is to capture the set of legalities as they occurred in the past, or, in other words, to describe the historical framework of legal argumentation.¹⁵⁴

¹⁵⁴ Paul G. McHugh, “The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History and the Tribes” in Anthony Musson & Chantal Stebbings, eds., *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012) 164 at 194-5.

Thus, although First Nations positions are easily overlooked in this history since they had no hand in the key federalism cases that determined the (non)status of treaties as constitutional events and had poor access to the justice system more generally, this history will endeavour to include their positions on the legality of treaties that have been expressed throughout Canadian history.

We will then move on to the definition of treaties at law, as set out in more recent cases considering s 88 of the *Indian Act*.¹⁵⁵ Finally, this section of the paper will finish by considering how courts interpret treaty rights. The aim is to bring these discussions together, along with the conclusions of the previous two sections to critique Canadian jurisprudence in light of its coherence with treaty histories and the potential of treaties to ground a post-colonial constitutionalism.

i. Treaties and sovereignty: Treaties as constitutional event, the doctrinal history version

As discussed in the first section, treaties are important to scholars concerned with a more secure and just legal foundation for Canadian sovereignty than colonial doctrines. These scholars illustrate what the law could be, a vision that does not necessarily accord with the current or past state of the law. To arrive at those visions and consider how treaty jurisprudence contributes to such aims, it seems important to consider the characterizations of the significance of treaties available at law, characterizations that

¹⁵⁵ *The Indian Act*, RSC 1985, c 1-5 [*Indian Act*].

have only occasionally hinted that treaties might have a constitutional character that is “integral to the very fabric of Canada.”¹⁵⁶

The doctrinal treatment of the status and significance of treaties follows a path that is similar to the legal history of aboriginal title as well as stages in the development of Imperial common law and international law. In a familiar arc, the dominant view of treaties in British North America moves from some degree of legal enforceability in the pre-modern period, to non-justiciable political acts by the late-nineteenth or early-twentieth century, and then returns to justiciability in the second half of the twentieth century. It is, to be clear, a legal history of Imperial and colonial character. Although principles that direct a generous and liberal interpretation of treaties in favour of Indian nations appear to be almost as old as treaty litigation itself,¹⁵⁷ it is only in the post-1982 era that Canadian courts have made indigenous perspectives – and potentially, indigenous law – relevant to treaty interpretation and aboriginal rights more generally. But the (colonial) legal history is far from uniform in its consideration of treaties with indigenous peoples and the historical path is not as neat as I have just described.

¹⁵⁶ Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000-2001) 26 Queen's Law J. 143 at 155 [Christie].

¹⁵⁷ In the first level arbitration decision on the *Ontario v Canada (Annuities Case)* (1895), 25 SCR 434, [1895] SCJ No 96 (QL) [*Annuities Case*, SCC, cited to QL] for example, Chancellor Boyd relied on McLean J’s concurring reasons in *Worcester v Georgia*, (1832) 31 US (6 Pet) 515 [*Worcester v Georgia*], in which McLean J stated that “[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense” (at 582). This principle was generally accepted by the courts in the two appeals from the arbitration decision, although not its applicability in this dispute between Ontario and Canada.

In the seventeenth and eighteenth century, when the law of nations had not yet settled into its later fixations on the state and territorial sovereignty, Indian nations in North America were generally conceived as having some status and rights amongst nations albeit not the same status and rights as Christian nations.¹⁵⁸ Influenced by the developing law of nations, British colonial practice involved treaty-making with indigenous peoples in North America, which, in this period, assumed that indigenous peoples had the necessary political sovereignty to do so. British assertions of territorial sovereignty (primarily against other European powers) were not assumed to bring indigenous peoples under British governance, relying instead on treaty-making to achieve alliances and set the form of any *imperium* asserted over Indians in accordance with their consent.¹⁵⁹ Corresponding to the multiple forms of treaties in the eighteenth century noted in the previous sections, treaties thus defined the degree of jurisdiction or protectorship the British colony acquired over the Indian nation, or determined whether the nation maintained its political independence within or outside of the colony's boundaries.¹⁶⁰ Litigation testing the juridical quality and bindingness of treaties in this period demonstrates a full range of argument about the status of Indian nations, their law

¹⁵⁸ S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford University Press, 2004) at 19, citing Vitoria and Grotius. For a brief discussion of some of the theorists and scholarship, see Craig Bryan Yirush, "Claiming the New World: Empire, Law and Indigenous Rights in the Mohegan Case, 1704-1743" (2011) 29 Law and History Review 333 at 335-339 [Yirush].

¹⁵⁹ See Paul G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004) [McHugh, *Aboriginal Societies*] at 102-3.

¹⁶⁰ *Ibid.* at 99. McHugh notes that the nature of the relationships found in early American colonies might have more to do with native forms than English ones.

and their lands. As Craig Yirush remarks in relation to his examination of the *Mohegan Indians v Connecticut* (1705-1773), the Mohegan's legal fight against their dispossession created a record of a "complex trans-Atlantic debate about indigenous rights in the eighteenth-century British world [encompassing] ... concrete disagreements over the ownership of land in America, the binding nature of treaties, and the locus of authority in the empire."¹⁶¹

Treaties in this early era contributed to the British acquisition of sovereignty by bringing tribes into peaceful relations with colonies, enabling acquisitions and further acquisitions of land, and sometimes bringing the tribes under British *imperium*. But treaties did not generally confirm or establish British sovereignty in one fell swoop. The famous decision of Chief Justice Marshall in *Worcester v Georgia* is considered to epitomize the pre-modern legal view of the status of Indian nations and nature of treaties:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians... The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.¹⁶²

¹⁶¹ Yirush, *supra* note 158 at 339. See also Walters, "Mohegan", *supra* note 142.

¹⁶² *Worcester v Georgia*, *supra* note 157 at 559-60.

Thus American Indian tribes were recognized as political communities who relinquished some but not all of their sovereignty through treaties.

The Royal Proclamation of 1763 confirmed the existing British policy and practice of treaty-making to accomplish surrenders of lands from an Indian band or nation. Treaties also remained instruments through which relationships of alliance were formed or affirmed. But as settler pressures grew in the nineteenth century, and as the law of nations and British imperialism shifted under the influence of the emerging positivism, so did judicial treatments of treaties. Tribes lost their status on the international stage and were no longer recognized as having the capacity to enter into international treaties.¹⁶³ Further, the rights of the European discoverer shifted from Chief Justice Marshall's interpretation of achieving only territorial claims against other European powers that had to be completed through war or treaties of cession, to achieving full territorial rights upon which the property rights of prior inhabitants persisted only by the goodwill of the Crown (until protected by legislation), rendering treaties as a matter of pragmatics and policy rather than law.¹⁶⁴ The judicial reflection of these shifts is illustrated by Prendergast CJ's reasons in New Zealand in *Wi Parata v Bishop of Wellington* in 1877.¹⁶⁵ There, he referred to the Treaty of Waitangi as a "simple nullity" in regards to construing the treaty

¹⁶³ Anaya, *supra* note 158 at 30, citing Westlake.

¹⁶⁴ P McHugh, *Aboriginal Societies*, *supra* note 159.

¹⁶⁵ (1877), 3 NZ Jur (NS) Sc 72. *Wi Parata* also denied the existence of any customary native title. After *Wi Parata*, the Privy Council overturned part of this case to hold that an enforceable native title claim existed against the Crown under the Native Rights Act in *Nireaha Tamaki v Baker*, [1901] AC 561. For an overview, see John Tate, "Tamihana Korokai and Native Title: Healing the Imperial Breach" (2005) 13 Waikato L Rev 108.

as a cession of Maori sovereignty, given his view that “[n]o body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.”¹⁶⁶

These shifts made themselves known in Canadian jurisprudence in the late nineteenth century, at first through the federalism disputes between Ontario and the federal government. Lord Watson’s seminal reasons in *St. Catherine’s Milling v The Queen*¹⁶⁷ equated Treaty 3 with a contract that accomplished the surrender of the Ojibway’s “personal and usufructory” property rights, allowing the Crown’s “substantial and paramount estate” to become a plenum dominium.¹⁶⁸ Lord Watson then reprised his role of articulating lasting principles of Canadian aboriginal law in the *Annuities Case*,¹⁶⁹ in which he described the annuities provisions of the Robinson treaties in issue as not conveying a right, but rather as a mere “promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province [of Upper Canada], that the latter should pay the annuities as and when they become due.”¹⁷⁰

¹⁶⁶ *Wi Parata, ibid.* at 78.

¹⁶⁷ *St. Catherine’s Milling v Ontario (Attorney General)* (1888), 14 App Cas 46, [1888] JCI No 1(QL) [cited to QL].

¹⁶⁸ *Ibid.* at para 6.

¹⁶⁹ *Ontario v Canada (Annuities Case)*, [1897] AC 199, [1896] JCI No 4 (QL) [*Annuities Case*, PC, cited to QL].

¹⁷⁰ *Ibid.* at para 17.

Finally, in the 1929 case of *R v Syliboy*,¹⁷¹ Patterson J brought Lord Watson's approach together with the removal of indigenous political personality from international law to dismiss the enforceability of the Mi'kmaq Treaty of 1752. He dismissed the Mi'kmaq's argument that the continuing rights to hunt and fish found in the terms of the 1752 Treaty protected them from provincial regulations based on the Mi'kmaq's lack of capacity to enter into a treaty as a people,¹⁷² adding, for good measure, that the Treaty of 1752 "was not a treaty at all;... it [was] at best a mere agreement made by the Governor and a handful of Indians", thus branding treaties as a form of political agreement that was unenforceable at law.¹⁷³

In all of these cases, and in contrast to the earlier era epitomized by *Worcester v Georgia*, the Crown's full territorial sovereignty, *imperium* and *dominium*, was assumed to be complete both in law and in fact.¹⁷⁴ On these assumptions, treaties were not required to secure the Crown's assertions or to bring indigenous peoples in British North America under the Crown's jurisdiction. Instead, treaties (and land rights) became understood as an expression of goodwill. As executive policy, indigenous rights could thus be altered when the will of the executive changed (unless secured by legislation).

¹⁷¹ *R v Syliboy*, [1929] 1 DLR 307, [1928] NSJ No 8 (QL) (N.S. Co. Ct) [*Syliboy* cited to QL]. For discussion, see William C. Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928. The King v Gabriel Sylliboy* (Toronto: University of Toronto Press, 2012) [Wicken, *Colonization*] and Macklem, *supra* note 3 at 138-139.

¹⁷² Patterson J also found that the Governor lacked capacity to treat on behalf of the Crown as a result of not having the appropriate delegation of powers from Great Britain (*ibid.* at para 24).

¹⁷³ *Ibid.* at para 23.

¹⁷⁴ See, e.g., Gwynne J: *Annuities Case*, SCC, *supra* 157 (in dissent).

In spite of these characterizations, it is too much of a leap to suggest that treaties were not justiciable in Canada through the nineteenth century; that the executive's "personal" goodwill and subsequent actions could not give rise to legally (or equitably) enforceable obligations. In some cases, it seems that the courts in Canada assumed that treaties were enforceable as some form of trust. For example, in the *Annuities Case*, the focus was on whether the obligation lay with the federal government, as the Supreme Court majority and Privy Council held, or had passed with the lands in issue to the province of Ontario under s 109 of the *British North America Act, 1867*, as the dissenters and original arbitrators had found. While the treaty promise was characterized as a "personal obligation" taken on by the governor representing the Province of Canada, the political trusts cases were not relied on and the enforceability of that form of promise by the First Nations was not in issue.¹⁷⁵ Indeed, if the obligation was one that could be ignored by the governments, there would have been no need to litigate. The assumption that treaty rights were to be respected was also evidenced in the negotiations around the Natural Resource Transfer Agreements of the 1930s, in which the Crown's ownership of lands and resources was transferred from the federal Crown to the western provincial Crowns to align their provincial status with that of the original members of Confederation. Each of those transfers included a provision protecting treaty hunting

¹⁷⁵ It is worth noting that all of the judges of the Supreme Court of Canada assumed that the annuities provisions of the Robinson Treaties would be honoured, with principles of equity and trusts figuring prominently in their construction of the nature of the Indian interest stemming from the treaty (*Annuities Case*, SCC, *ibid.*).

rights, thereby effecting the first constitutionalization of treaty rights in Canada,¹⁷⁶ giving rise to rights that were upheld in regulatory prosecutions soon after.¹⁷⁷

Dreaver v The King,¹⁷⁸ a case from 1935, marks another point at which a treaty was found to be legally enforceable. In this case, the federal Exchequer Court enforced the medicine chest provisions of Treaty 6, holding the federal government liable as trustee for medically related and other expenses it had charged back to the First Nations' accounts. Later in the twentieth century, enforceability of treaties became framed as a matter of contract. In the 1979 case, *Pawis v The Queen*,¹⁷⁹ Ojibway fishers charged with violating Ontario fisheries regulations defended themselves (and lost) by claiming the regulations were a breach of treaty obligations under the Robinson-Huron Treaty of 1850. The federal court rejected framing the issue as one of trusts, reading the *Annuities Case* through the line of Imperial "political trust" cases in which the trusts are admitted but unenforceable at law.¹⁸⁰ The court was willing to contemplate damages for a breach of

¹⁷⁶ Albeit a modified form of those rights, since the wording of the NRTAs has been held to have extinguished any commercial hunting rights and expanded the scope of those rights to beyond treaty territories to all unoccupied Crown lands within the province: *R v. Horseman*, [1990] 1 SCR 901 at 933. For discussion see Frank Tough, "The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (2004) 41 *Alberta L Rev* 999 and Kerry Wilkins, "Unseating Horseman: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*" (2007) 12 *Review of Constitutional Studies/Revue d'études constitutionnelles* 135.

¹⁷⁷ *R v. Wesley* (1932), 26 Alta LR 433, [1932] 4 DLR 774, 1932 CarswellAlta 20 (WL) [cited to WL]. McGillivray JA also commented on the enforceability of treaty rights at law at paras 57-61.

¹⁷⁸ *Dreaver v The King*, (1935) 5 CNLC 92 (Exchequer Court). In the later 1966 case of *Johnston v The Queen*, (1966), 56 DLR (2d) 749, the Saskatchewan Court of Appeal did not treat the medicine chest provision generously but nevertheless accepted a contractual model of interpretation that assumed the enforceability of treaty provisions against the Crown.

¹⁷⁹ (1979), 102 DLR (3d) 602 (FCTD). See Macklem, *supra* note 3 at 140, regarding *Pawis* as a shift to the contractual view of treaties.

¹⁸⁰ See, e.g., *Kinloch v The Secretary of State for India in Council* (1881-82), 7 App Cas 619.

contract but ultimately held that such an action was unfounded in the case. Thus the *Syliboy* line of reasoning was applied to reinterpret the *Annuities Case*. Nevertheless, *Dreaver* illustrates that *Syliboy*'s influence as a precedent in the first half of the twentieth century was limited and that differences regarding the legal nature of treaty obligations persisted.¹⁸¹

Throughout this history, First Nations' perspectives on their treaty rights and obligations are not well expressed in the jurisprudence,¹⁸² but it is certainly clear that they did not view the treaties as purely political and unenforceable at law. When opportunities presented themselves to press their concerns, they took them. For example, First Nations witnesses appeared before a special joint committee of Parliament and a 1946 Royal Commission to complain that their treaty rights and privileges were binding and were not being honoured.¹⁸³ Contestations also extend to what treaties accomplished. The Six Nations, for example, have steadfastly claimed they are not subjects of the Crown, disputing the Crown's view of the implications of their seventeenth- and eighteenth-

¹⁸¹ Indeed, legal commentary on *Syliboy* from 1929 disagrees with Patterson J's conclusions about the capacity of the parties to enter into the treaty: N.A.M. Mackenzie, "Case and Comment: Indians and Treaties in Law (*Rex v Syliboy*)" (1929) 8 Canadian Bar Review 561-568. However, Wicken notes that because *Syliboy* was decided just after Parliament restricted the ability of Indians to hire lawyers to pursue land claims, it had more significance. He also notes that at least in Nova Scotia, governments relied on *Syliboy* well into the 1970s (Wicken, *Colonization*, *supra* note 171 at 7 and 254, Footnote 6). In later cases, the decision in *Syliboy* was interpreted more narrowly, as limited to Patterson J's first finding that the treaty was made with a particular band of Mi'kmaq rather than applying to the whole tribe and therefore did not extend to encompass the defendant; see, e.g., *R v Wesley* (1975), 9 OR (2d) 524, 1975 CarswellOnt 452.

¹⁸² See Wicken, *ibid.*, for a book length treatment of the evolution of Mi'kmaq understandings of the eighteenth-century treaties.

¹⁸³ Canada, "Report of the Commission on Indian Affairs" No. 68B in *Sessional Papers* (1947) at 3-4, as cited by Kerry Wilkins, "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta L Rev 458 [Wilkins, "Still Crazy"] at 462, note 20.

century treaties. Their objections to the application of the *Indian Act* to their confederacy reached the courts in *Logan v Styres*¹⁸⁴ in 1959. They expected the Haldimand Deed of 1784 and the Simcoe Deed of 1793 – documents that granted the Six Nations territory in southern Ontario for their loyalty to the British in the American war of independence – to support their claims. Instead, the Ontario High Court found that “by accepting the protection of the Crown” the Six Nations “then owed allegiance to the Crown and thus became subjects of the Crown.”¹⁸⁵ Contestations and deviations are as much part of this legal history as the main line of doctrine that took hold.

Thus, in the early modern period (and later, in other parts of the British Empire¹⁸⁶), treaties were related to the process by which sovereignty was acquired, but in late nineteenth-century Canada, this connection was severed in the dominant line of judicial opinions. Sovereignty was viewed as complete without the contributions of indigenous peoples, and the primary significance of treaties at law was a gesture of political goodwill in ensuring a consensual basis for land surrenders, clearing the burden of aboriginal title from the otherwise full property rights of the Crown.¹⁸⁷ Under this line

¹⁸⁴ *Logan v Styres* (1959), 20 DLR (2d) 416, 1959 CarswellOnt 228 (WL) (Ont HC) [*Logan* cited to WL]. For discussion, see Darlene Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44 Univ. of Toronto F. of L. Rev. 1 at 20-23.

¹⁸⁵ *Logan, ibid.* at para 16. Hamar Foster points out that the Court’s move from protectorship to subjecthood was inconsistent with American precedent and international law principles: Hamar Foster, “Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases” (1992) 21 Manitoba L. J. 343 at 345, footnote nine.

¹⁸⁶ See Kent McNeil, *Common Law Aboriginal Title* (New York Oxford University Press, 1989) at 110-133 for a discussion of treaties in relation to judicial classifications of whether colonies were conquered, ceded or settled.

¹⁸⁷ McNeil, “Extinguishment”, *supra* note 132.

of authorities, the treaties might still be understood as constitutional in character. It was simply an Austinian sense of constitutionalism, in which the command of the sovereign was law and the acquisition of territory and sovereignty through coercive forces was a fact of political life, beyond the purview of the rule of law.¹⁸⁸ Nevertheless, this line of cases should not eclipse the continuing presence of other constitutional traditions, represented in the presence of political and legal opinion that the Crown's gestures of "goodwill" were actionable and mandatory, and the persistence of indigenous advocacy for the enforcement and implementation of their understanding of the treaties.

By the mid-twentieth century, the dominant judicial approach to treaties began to shift again. In 1951, the enforceability of treaties was partially solidified by section 87 (later 88) of the *Indian Act*, a provision that extended the application of provincial law where it would otherwise not apply in light of federal jurisdiction over Indians and Indian Lands.¹⁸⁹ Section 88 makes treaties enforceable by also setting out an exception: the extension of provincial laws is subject to the terms of any treaty, thereby making treaties enforceable as against the application of provincial laws. Through the jurisprudence on section 88, a significant shift in the conceptualization of treaties occurred. In *R v.*

¹⁸⁸ Jeremy Webber, for example, discusses the political philosophy of Hume, who argues that all political authority is historically founded on force : Jeremy Webber, "The Meanings of Consent" in Jeremy Webber and Colin M. Macleod, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3 at 3-5 [Webber, "Consent"].

¹⁸⁹ Under s 91(24) of the *Constitution Act, 1867* (titled the *British North America Act, 1867* before 1982). See generally Kerry Wilkins, "'Still Crazy After All These Years': Section 88 of the Indian Act at Fifty" (2000) 38 *Alberta Law Review* 458 [Wilkins, "Still Crazy"].

Simon,¹⁹⁰ the Supreme Court relegated *Syliboy* to an artifact of an earlier and outdated set of colonial attitudes. The Court moved past this precedent by correcting the capacity issues raised by Patterson J and differentiating Crown-aboriginal treaties from international treaties by identifying them as *sui generis*.¹⁹¹ The *sui generis* approach recognizes the capacity of Indian nations to have entered treaties as political communities within the state, but it does not resurrect the American line of authorities (*i.e.*, *Worcester v Georgia*) to address how treaties relate to the acquisition of sovereignty. If anything, the *sui generis* status of treaties in Canada muddled the sovereignty waters.¹⁹²

The introduction of s. 35 in 1982 gave constitutional force to treaty rights and increased momentum towards settling longstanding grievances around the meaning and implementation of historic treaties. The phrasing of s. 35, however, focused legal attention on particular terms and promises in a manner that avoids the more difficult questions around the role of treaties in the formation of the Canadian state. In other words, the constitutionalization of treaty rights has not addressed the constitutional status of treaties themselves. The Supreme Court has only broached this issue in relation to its articulation of a constitutional duty to consult and accommodate aboriginal peoples, and

¹⁹⁰ *R v Simon*, [1985] 2 SCR 387 [*Simon*].

¹⁹¹ *Ibid.* at para 33.

¹⁹² Some commentators view the *sui generis* status of treaties (and aboriginal rights more generally) as potentially helpful in understanding treaties as a product of both British and indigenous legal traditions. See, e.g., Henderson, *supra* note 18 and John Borrows & Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 *Alta L R* 9. For a contrasting view, see Michael Coyle, "Marginalized", *supra* note 43.

then only in passing. In the seminal 2004 decision, *Haida Nation v British Columbia*,¹⁹³

McLachlin CJ commented that

[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition.... This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.¹⁹⁴

This comment, coupled with her attention to the difference between *de facto* and *de jure* sovereignty (another first in the Supreme Court's jurisprudence), situates treaties as the key process by which Crown sovereignty may finally be part of a rule of law that encompasses both indigenous and European legal traditions.¹⁹⁵ Thus, *Haida Nation* offers a crack in the door of Canada's constitutional origins which might permit the significance of treaties as "integral to the constitutional fabric of Canada" to finally be addressed as a matter of law and not just theory.

ii. Defining treaties at law (domestic)

Beyond judicial treatments of the constitutional significance of treaties and the interpretation of defining treaty rights, the way that Canadian courts have defined treaties

¹⁹³ *Haida Nation v British Columbia*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

¹⁹⁴ *Ibid.* at para 20.

¹⁹⁵ For commentary on this point see Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L. J. 470 at 513-516 [Walters, "Morality"]; Borrows, "Ground Rules", *supra* note 3; and Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012). For discussion of the difference between *de jure* and *de facto* sovereignty more generally, see Kent McNeil, "The Meaning of Sovereignty", draft chapter (on file with author).

is also of interest in our multi-disciplinary survey. The s. 35 jurisprudence does not define treaties; the question of “what is a treaty” does not occur in a jurisprudence directed at particular promises or treaty terms. Instead, this question comes up in the jurisprudence around s. 88 of the *Indian Act*, where direct consideration of what qualifies as a treaty is necessary to determine when the exception to the application of provincial law applies. In this context, the Supreme Court has taken a remarkably broad approach to what may qualify as a treaty in law.

Avoiding any overarching definition of treaties, the Court has explicitly rejected approaches based on subject matter, such as land cessions or peace and friendship. Instead, Lamer J (as he was then) stated in *R v. Sioui* that treaties are identified by “the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”¹⁹⁶ This broad approach draws directly from *R. v. White and Bob*, in which Norris J.A. of the British Columbia Court of Appeal stated:

In [s. 87; now s. 88] “Treaty” is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term “the word of the white man” the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.¹⁹⁷

¹⁹⁶*Sioui*, *supra* note 1 at 1044. See also, *R. v. Simon*, *supra* note 14. In *Francis v the Queen*, [1956] SCR 618 the Court rejected international treaties such as the Jay Treaty from falling within s. 88’s purview, but this does not limit such treaties from being considered under s. 35 (*Mitchell v Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911).

¹⁹⁷ *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA) at 648-49, *aff’d*, (1965), 52 D.L.R. (2d) 481 (SCC).

Lamer J also adopted five factors extracted from the Ontario Court of Appeal's decision in *R. v. Taylor and Williams*¹⁹⁸ to guide the analysis of the historical context and the intent to make a treaty: 1) continuous exercise of a right in the past and at present; 2) the reasons why the Crown made a commitment; 3) the situation prevailing at the time the document was signed; 4) evidence of relations of mutual respect and esteem between the negotiators; and, 5) the subsequent conduct of the parties.¹⁹⁹ These factors incorporate attention to the parties' relationships and practices both before and after the agreement in issue into the identification of which treaty obligations are relevant at law, reflecting the directions emerging from the historical overview in the previous section.²⁰⁰

This approach to identifying treaties in the jurisprudence around section 88 accords reasonably well with the breadth of treaty experience described in the section on treaties in history. It does not establish any barriers to arguing that a treaty was made regardless of the form of documentation. And it allows for the possibility that treaties

¹⁹⁸ *R v Taylor and Williams* (1981), 34 OR (2d) 360, [1981] 3 CNLR 114 [*Taylor and Williams*], lv. to appeal dismissed, [1981] SCCA No. 377.

¹⁹⁹ *Ibid.* Adopted in *Sioui*, *supra* note 1 at 1045. In *Taylor and Williams*, these factors along with the principle of the honour of the Crown were part of the analysis of the binding character and scope of a treaty promises that was recorded in the minutes of the treaty negotiations but not in the terms of the treaty document. In *R. v. Simon*, the fifth factor was considered to determine whether the treaty was terminated or limited by subsequent hostilities. The Court held that the treaty was not terminated, finding that the Crown had not met its burden of proof regarding termination of the treaty (*supra* note 14 at para 34).

²⁰⁰ The interpretation of the terms of the 1818 treaty in issue in *Taylor and Williams* involved dealing with several fur trade practices and expectations, including the meaning of the word "milk" and the easily misconstrued negotiation tropes of hunger and pity. On the former, see Bruce M. White, "'Give Us a Little Milk': The Social and Cultural Meaning of Gift Giving in the Lake Superior Fur Trade" (1982) 48 *Minnesota History* 60. On the latter, see Mary Black-Rogers, "Varieties of 'Starving': Semantics and Survival in the Subarctic Fur Trade, 1750-1850" (1986) 33 *Ethnohistory* 354 and Promislow, "I bring thee merchandise", *supra* note 102.

evolved through the subsequent conduct of the parties. While the emphasis on the Crown's interests in making treaties in the five factors adopted in *Sioui* may tilt the approach to one side, the emphasis on the reliance of the aboriginal parties on the promises of the Crown in *R. v. White and Bob* provides a counter-point that potentially connects treaties to discussions of constitutional origins. Most importantly for this discussion, it is notable that the notion of a "common intention" between the parties regarding the content of particular treaty provisions – which, as we will see below, dominates s. 35 jurisprudence – is absent. Instead, mutuality is important only in regards to identifying an "intention to create obligations" and the presence of "mutually binding obligations," neither of which demands a finding of shared meaning with respect to the treaty itself or particular treaty promises. As will be discussed below, the focus on "common intention" in s. 35 treaty rights interpretation narrows the expansive approach to treaties that emerged from the s. 88 cases.

iii. Defining treaty rights

The introduction of s 35 through the *Constitution Act, 1982* "recognized and affirmed" existing treaty rights, shifting the emphasis of treaty litigation towards the scope and nature of particular treaty promises (and once rights are established, whether government action infringing those rights can be justified). By this time, a principle of a generous and liberal interpretation of the words of statutes relating to Indians was already established, adopted from *Worcester v Georgia* as noted earlier (*Annuities Case*). In *R v*

Badger,²⁰¹ Justice Cory summarized the gist of this longstanding interpretive stance as follows:

Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement....The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.²⁰²

One additional principle – the honour of the Crown – has also been brought forward from the nineteenth century and is relied on to slightly different effect from the above set of principles.²⁰³ Specifically, the honour of the Crown directs courts to avoid interpretations of treaty commitments that would give the appearance of “sharp dealing” on the part of the Crown.

These well-established principles were last revisited in *R. v. Marshall*, a case that arguably re-focused treaty interpretation from the “generous and liberal” principles above to reconstructing a historical mutual intention as the aim of treaty rights interpretation. At

²⁰¹ [1996] 1 SCR 771 [*Badger*].

²⁰² *Ibid.* at para 52.

²⁰³ See, e.g., Norris JA in *White and Bob*, *supra* note 197; Gwynne J (dissenting) in the *Annuities Case*, *supra* note 175; and Cartwright J (dissenting) in *R v George*, [1966] SCR 267.

issue in *Marshall* was the truckhouse clause of a 1760-61 treaty and whether it provided the basis for a contemporary right to catch and sell fish. The text of the clause in issue was spartan, stating only that the Mi'kmaq promised to trade exclusively at the British truckhouses.²⁰⁴ The truckhouse system itself was replaced with a (less-expensive) system of licensed traders in 1762. The majority judgment, written by Binnie J., reached beyond the inadequacies of the written agreement. He drew from historical sources surrounding the negotiation of the 1760-61 treaty, such as Mi'kmaq negotiators' plea for the truckhouses to furnish them with their necessities through trade, to support his conclusion that the negative covenant contained in the treaty (to trade only at British truckhouses) implied a positive Mi'kmaq right to bring their goods to the truckhouse to trade for their necessities and, consequently, to access the resources that were to be traded (in this case, eels). The treaty was thus found to support a modern right fish and to sell the products of such traditional activities up to the level of a moderate livelihood.

Binnie J's judgment emphasized the idea of reconstructing the parties' *common intention* from a broad view of the historical context of the treaty. He described the aim of treaty interpretation as follows: "The bottom line is the Court's obligation is to 'choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles' the Mi'kmaq interests and those of the

²⁰⁴ Available online: < <http://www.aadnc-aandc.gc.ca/eng/1100100029046> >

British Crown.”²⁰⁵ According to Binnie J, the inequities and differences that imbue this treaty history demand that the Court reach beyond the written treaty to imply terms to make “honourable sense” of the treaty and to interpret terms once they are found to exist. The honour of the Crown was thus critical to how Binnie J arrived at this interpretation. As he stated, “an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is [not] consistent with the honour and integrity of the Crown...[T]he trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown.”²⁰⁶ Thus, whatever the historical intention of the Crown might have been at the time, Binnie J’s reasons show that the honour of the Crown is capable of both limiting the availability of some interpretations as well as implying additional treaty terms, such as access to the resources and harvesting activities necessary to participate in the trade secured by the treaty.

The dissenting opinion, written by McLachlin J (as she was then), accepted the trial judge’s assessment of the evidence that the common intention was only to create a right to trade at truckhouses, not a general right to trade. This conclusion was based primarily on the wording of the treaty. McLachlin J favoured an interpretation that relied on the historical evidence that the truckhouse system fell into disuse soon after the treaty

²⁰⁵ *Marshall*, *supra* note 76 at para 14 [emphasis in original]. The quote is from Lamer J in *Sioui* (*supra* note 92). Interestingly, Lamer J made those comments to introduce a check on the liberal interpretation principles that favour First Nations: “Even a generous interpretation of the document, such as Bisson J.A.’s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons’ interests and those of the conqueror” (*Sioui*, *ibid.* at 1069)

²⁰⁶ *Marshall*, *supra* note 76 at para 52.

so as to render the treaty right to trade obsolete. She claimed that Binnie J's approach transformed a "specific right agreed to by both parties into an unintended right of broad and undefined scope."²⁰⁷ In spite of their different interpretations of the facts, however, McLachlin and Binnie JJ purported to apply the same interpretive principles and McLachlin J's nine-point version of the principles is often cited as authoritative.²⁰⁸

While there appears to be a high degree of judicial consensus about the principles of treaty interpretation, the honour of the Crown principle retains an open-ended quality that is not surprising given differences in judicial deployment. In *Badger*, for example, Cory J indicated that the integrity of the Crown requires an assumption "that the Crown intends to fulfill its promises" and that "[n]o appearance of 'sharp dealing' will be sanctioned."²⁰⁹ This version of the principle is potentially more limited than Binnie J's version in *Marshall*, where the honour of the Crown ensures that promises have "meaning and substance." In Cory J's version, the honour of the Crown ensures that promises, presumably identified and defined through the other interpretive principles, are fulfilled. Thus, the honour of the Crown might bar an interpretation of treaty promises as short-term obligations where such promises were delivered with assurances of the treaty's longevity – even if a short-term commitment was all the Crown intended or expected. By contrast, Binnie J's version the honour of the Crown may inform the

²⁰⁷ *Ibid.* at para 102.

²⁰⁸ *Ibid.* at para 78.

²⁰⁹ *Badger*, *supra* note 201 at para 41. See also *Haida Nation*, *supra* note 193 at para 20.

content of those promises; as illustrated in *Marshall*, the principle can ground the identification of adjunct rights that were not explicitly promised in the treaty record.²¹⁰ Apart from this difference, however, the treaty interpretation principles are well-established and apparently uncontroversial.

Academic evaluations of *Marshall* were, for the most part, cautiously optimistic: the principles contained the necessary ingredients for recognizing the “spirit and intent” of the treaties beyond the treaty text.²¹¹ As Mark Walters commented: “*Marshall* is premised upon the idea that treaties with aboriginal nations are not documents or written instruments but rather are relationships – or, more precisely, they represent a shared understanding of and commitment to a normative framework for cross-cultural relationships.”²¹² One of the reasons for this cautious optimism was the decision’s clarification that extrinsic evidence, such as oral history or other records relating to the context of negotiation, may be used to assist in all cases of treaty interpretation, rather than only where the court found ambiguity in the written treaty. Indeed, the principles are flexible enough to treat the text as more or less central to the interpretation of the treaty, as the historical circumstances require.

²¹⁰ For an argument that Binnie J’s application of the honour of the Crown went too far in *Marshall*, see Robert Normey, “Angling For “Common Intention”: Treaty Interpretation in *R. v. Marshall*” (2000) 63 Sask L Rev 645 [Normey].

²¹¹ See, e.g., Leonard I. Rotman, “Marshalling Principles From The Marshall Morass” (2000) 23 Dalhousie L J 5 and Catherine Bell & Karin Buss, “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises” (2000) 63 Sask L Rev 667. For a contrasting view of *Marshall* as a continuation of a *status quo* incapable of arriving at the true spirit and intent of the treaties, see Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000-2001) 26 Queen’s L J 143.

²¹² Mark D Walters, “Brightening the Covenant Chain. Aboriginal Treaty Meanings in Law and History After Marshall” (2001) 24 Dalhousie L J 75 at 78 [Walters, “Covenant Chain”].

Since *Marshall*, the Supreme Court has reiterated these principles and emphasis on determining a historically pinpointed common intention as the baseline for defining treaty rights.²¹³ However, as the gulf between Binnie and McLachlin JJ's interpretations in *Marshall* illustrates, these well-established interpretive principles do not constrain judicial interpretation in application. In *R. v. Bernard; R v Marshall*,²¹⁴ for example, the interpretation of the same truckhouse clause from *Marshall* was again in issue, but this time in relation to logging rather than fishing rights. While the primary significance of this case is the discussion of aboriginal title, the quick work of the Court in dismissing the treaty claim is of interest for present purposes. The claim was that the truckhouse clause supported trading rights in relation to the products of any Mi'kmaq traditional harvesting activities. The counter-argument was that the clause supported trading rights only in relation to items traded at the time of the treaty. The evidence showed that although the Mi'kmaq used wood, they did not conduct much or any trade in forest products at the time of the treaty (distinguishing the case from *Marshall*). McLachlin CJ's majority reasons refer briefly to the historical context of alliance surrounding the treaty, but strongly rely on the words of the treaty itself in siding with the Crown and rejecting the claim: "This [interpretation] is supported by the wording of the truckhouse clause. It speaks only of trade. Nothing in these words comports a general right to

²¹³ See, e.g., *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at para 18.

²¹⁴ *R. v Bernard; R v Marshall*, 2005 SCC 43, [2005] 2 SCR 220 [*Bernard; Marshall*].

harvest or gather all natural resources then used.”²¹⁵ Text, not relationship, defined the scope of the inquiry. Moreover, the text-driven approach ensures that, at their core, treaty rights represent historical moments of common intention as determined by the courts, whether supported by historical opinion or not. The constitutional significance of treaties is thus also conveyed through these artificial moments of consent, a significance that stands in sharp contrast to the process-oriented constitutional narratives that give consent an aspirational quality.

Post-*Marshall* decisions in lower courts also demonstrate a stubbornly text-driven approach to interpretation. In *Benoit v Canada*,²¹⁶ *Victor Buffalo*, and *Ermineskin Indian Band v Canada*,²¹⁷ for example, the plaintiffs’ claims of treaty rights based on oral promises (as opposed to terms in the treaty text) were rejected. The treatment of oral tradition evidence in these cases is an important aspect of these results. In *Victor Buffalo*, for example, Teitelbaum J preferred the Crown historical expert’s approach of using oral history evidence as one of many sources or as a check on text in reconstructing “a real past independent of what people presently believe it to be,”²¹⁸ and generally preferred written historical accounts over oral tradition as a matter of assessing the weight to be

²¹⁵ *Ibid.* at para. 20. For a critical discussion of the treaty claim, see John McEvoy, “Treaty Rights and a Treaty Table” (2006) 55 UNB L J 105.

²¹⁶ *Canada v Benoit*, 2003 FCA 236, 228 DLR (4th) 1 [*Benoit*].

²¹⁷ *Ermineskin Indian Band v. Canada*, 2005 FC 1623 [*Ermineskin*], aff’d 2009 SCC 9, [2009] 1 SCR 222. There was no discussion of oral history evidence at the Supreme Court.

²¹⁸ *Victor Buffalo*, *supra* note 134 at para 454, quoting the Crown’s historical expert Dr. von Gernet. Dr. von Gernet’s approach to working with oral traditions was also accepted by the Federal Court of Appeal in *Benoit*, *supra* note 216.

attributed to the different sources of evidence. As Teitelbaum J noted, such an approach is consistent with direction from the Supreme Court's jurisprudence to give 'due weight' to oral evidence.²¹⁹ These principles cannot, in the abstract, designate the weight that must be attributed to oral tradition evidence in a given case. *Morris*, in which the Douglas Treaty hunting right was held not to exclude the Saanich Nation's traditional practice of night hunting, and the recent *Keewatin*²²⁰ decision, in which the Crown's right to take up lands under Treaty 3 was held to be exercisable only with the authorization of the federal Crown (reflecting the specific reference to the "Dominion government" in the text of this clause), might be held out as counter-points illustrating the capacity of the treaty rights jurisprudence to take First Nations perspectives seriously. However, neither case involved any controversy over the existence of the treaty rights in issue, and in both the key issues were federalism concerns over the jurisdiction of the province in relation to treaty rights.

A text-driven approach to treaty interpretation disappoints because of the limited access to indigenous perspectives available through a text that First Nations did not draft and often could not read. Moreover, as the previous section on treaties in history implied, not all treaties (or treaty promises) were recorded in documentary form. Without assuming that the treaty claims in *Ermineskin* or *Benoit* had to succeed to be fair, the

²¹⁹ *Victor Buffalo*, *ibid.* at paras 38-44, 451-453. See also *Benoit*, *ibid.* The discussion in *Benoit* also dealt with the need for evaluating the nature of the oral tradition witnesses' expertise and differences between indigenous oral traditions. For discussion, see B Miller, *supra* note 149 at 106-113, and Napoleon, "Straightjacket", *supra* note 149.

²²⁰ *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 [*Keewatin*], appeal filed: docket #C54314.

treatment of the oral tradition evidence in these cases leaves readers (and no doubt First Nations claimants) with the impression that their claims were not fully heard. These problems and the need for courts to work with oral tradition evidence are well-understood by scholars and courts, so we must ask: Why is text-driven treaty interpretation still dominant? Why is it so difficult to move beyond this approach?

The continued dominance of text in the face of principles that direct the interpretive efforts away from the text is, in part, an institutional problem. Canadian judges demonstrate the limited nature of their collective imagination in their inability to conceive of treaties beyond their representation in the written text.²²¹ Documentary forms of historical evidence are similar to the forms of evidence judges are accustomed to in civil litigation. As such, judges often make their own assessments of historical documents, much to the consternation of the expert witness historians who perhaps wish their craft was more like a hard science, attracting fewer hobbyists.²²² However, the issue is not simply that treaties remain a fundamentally written phenomenon to courts, but that

²²¹ *Keewatin*, it should be noted, illustrates a case where the text of the document favoured the First Nation's perspective and the historical evidence relied on by Sanderson J showed the treaty signatories to be attentive to the text. It should not be assumed that the text of treaties is unimportant to either of the parties.

²²² See, for *e.g.*, J. R. Miller's lament regarding the enthusiasm Binnie J. shows as an amateur historian in his decision in *Marshall*: "History, the Courts and Treaty Policy: Lessons from Marshall and Nisga'a" in Jerry P. White, Paul Maxim & Dan Beavon, eds., *Aboriginal Policy Research : Setting the Agenda for Change* (Toronto: Thompson Educational Pub, 2004) 29. For his part, Binnie J displayed significant awareness of the different disciplinary demands of law and history in *Marshall*, stating "The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can." (*supra* note 76 at para 37). However, this difference regarding conclusive interpretations is not the concern that I am addressing here.

judges appear to remain “positivist troglodytes” about history.²²³ The epistemological crises faced by the social sciences and academic history in the latter part of the twentieth century – crises that take aim at the stability and durability of historical facts and past exclusions of minority and marginalized populations in the writing of history²²⁴ – have not filtered into the court room. History in aboriginal rights cases is still of the sort that expects to find, as Crown historian von Gernet put it, “a real past.” Moving past a text-driven approach thus involves an epistemological shift to make space for indigenous law and oral histories, but also away from written law and the positivist tradition of history.

As the post-*Marshall* treaty jurisprudence demonstrates, principles alone cannot shift the narrative and epistemological foundations from which interpretation proceeds. The institutional and epistemological aspects of the problems suggest solutions that lie outside the litigation of particular cases, such as increasing the number of aboriginal decision makers and the creation of a specialized treaty tribunal. Both recommendations have been made before and there is no need to repeat these analyses here.²²⁵ However,

²²³ The phrase is from Lawrence Stone, *supra* note 145 at 190.

²²⁴ See discussion above, in section II. See generally Dipesh Chakrabarty, “Reconciliation and Its Historiography: Some Preliminary Thoughts” (2001) 7:1 *The UTS Rev.* 6.

²²⁵ See, e.g., RCAP’s recommendation of a specialized tribunal to deal with specific claims, including jurisdiction over “any issue relating to treaties that is currently justiciable in the courts,” the ability to return land as a remedy, and a limited supervisory role over the procedural aspects of comprehensive claims negotiation (RCAP, *supra* note 3, v 2, part 2, chptr 4, online: http://www.collectionscanada.gc.ca/webarchives/20071211054242/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh55_e.html#6.4). The mandate of the recently operational Special Claims Tribunal is much narrower than was envisioned by RCAP, offering monetary remedies rather than the return of land, but does include the jurisdiction to adjudicate historic treaty grievances with finality: online < http://www.sct-trp.ca/hist/hist_e.htm >. See also John Borrows’ comments on the need to appoint more

there is still room within the jurisprudence itself to consider what principles and approaches might support treaties as relationship, as constitutional events, and as ongoing constitutional processes. Such a jurisprudence will require a shift in focus away from common intent.

iii. Directions

The above discussion of the treaty jurisprudence shows that it produces an unhappy marriage of law and history, and a deficient, obscured constitutional narrative. To arrive at possible directions for a shift of emphasis in the treaty rights jurisprudence, the remainder of this section will focus on the issues that emerge from the above analysis and then outline the ramifications and directions for treaty jurisprudence. The aim, as stated above, is for a jurisprudence that coheres with the constitutional promise of treaties, which, incidentally, would also better promote the Court's vision of s 35 rights facilitating reconciliation between the state and aboriginal peoples.

A. Public history and the legal fiction of common intention

As discussed above, the interpretive principles ask judges and parties to look for a historical common intention, instructing them to choose from amongst the possible interpretations of a treaty the one interpretation that best reconciles the parties' interests

aboriginal members of the judiciary: John Borrows, *Indigenous Legal Traditions in Canada, Report for the Law Commission of Canada*, January 2006, chptr 6.

at the time of the negotiation. Walters observes that this judicial inquiry “purports to be primarily an historic one....; shared treaty-meanings appear to be treated as facts and not laws.”²²⁶ However, as Walters points out, the idea of a common intention is primarily a normative concept, rather than a factual one. The empirical emphasis thus obscures the normative foundations for constitutionally protecting treaty rights. Our first issue is the disjuncture that this empirical presentation introduces between academic history and history in court, presenting concerns related to what antipodean scholars have described as “juridical history”: “a mode of representing the past so as to make it available to legal and quasi-legal judgment in the present.”²²⁷

The disjuncture between juridical and academic history is not necessarily problematic: law and history are different interpretive communities and they do not have to reach shared conclusions about the past.²²⁸ These different fields of knowledge may also serve different ends. Miranda Johnson, for example, has argued that, in deciding matters of aboriginal rights, institutions such as the Waitangi Tribunal are tasked not only with granting historical justice but with re-imagining history to support the re-founding of

²²⁶ Walters, “Covenant Chain” *supra* note 212 at 94.

²²⁷ Andrew Sharp, “History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa” in Michael Peters, ed, *Cultural Politics and the University in Aotearoa/New Zealand* (Palmerston North: Dunmore Press, 1997) 159 at 160-1, 166. See also McHugh, *Aboriginal Societies*; *supra* note 159, chptr 1.

²²⁸ See Walters, “Covenant Chain”, *supra* note 212 for a discussion of law and history as distinctive interpretive communities. He argues that, when it comes to finding shared treaty meanings in the past, law and history appear to be working within the same interpretive dimensions (*ibid.* at 94). See also Mark D. Walters, “Histories of Colonialism, Legality, and Aboriginality” (2007) 57 *University of Toronto Law J.* 819 and Damen Ward, “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australia” (2003) 1 *History Compass* 1-24 at 15-19.

the nation-state.²²⁹ In this role, historical narratives that construct “a formal [political] equivalence ...[render] political concepts like biculturalism and partnership thinkable in contemporary New Zealand. But in order for these concepts to be established as re-foundational they must be thickened with an (imagined) historical past.”²³⁰ Thus, juridical history may be productive of national or official history in a manner that is distinctive from the contributions of empirically-oriented histories, particularly if we take the authoritative voice of the courts into account. In the case of treaty interpretation, however, the disjuncture between juridical and descriptive academic histories is problematic.

The treatment of historical evidence by courts is one aspect of the disjuncture that has attracted a great deal of commentary. Arthur Ray, for example, has commented that the adversarial process of treaty and aboriginal rights litigation can polarize and destabilize academic opinion, potentially resulting in the “dredging up [of] outdated theoretical perspectives” or the invention of “new ones on the witness stand,” even while creatively pushing the scholarship on indigenous history and indigenous-settler relations in new directions.²³¹ More problematic ramifications of the disjuncture, however, can be felt far beyond academia. The occasionally violent aftermath of the *Marshall* decision between east coast fishers — who perceived the treaty right recognized by the Supreme

²²⁹ Miranda Johnson, *Struggling Over the Past: Decolonization and the Problem of History in Settler Societies* (PhD Thesis, University of Chicago, Department of History, 2008) [unpublished] [Johnson].

²³⁰ *Ibid* at 254.

²³¹ Arthur J Ray, “Native History on Trial: Confessions of an Expert Witness” (2003) 84 Cdn Hist Rev 253 at 269.

Court as a threat to their livelihood — and the Mi'kmaq is the most obvious manifestation of this phenomenon.²³² The argument is not that the disjuncture between judicial and academic history caused the violence. As Ken Coates convincingly demonstrates, the eruption around *Marshall* was not caused by the Supreme Court's decision, but was, rather, embedded in a much longer history of simmering and unresolved disputes.²³³ The concern is instead how this disjuncture promotes continued public confusion and discord about why aboriginal rights are constitutionally protected, potentially undermining the authority of law.²³⁴

In the reaction to *Marshall*, the Court's finding was perceived to be 'invented' given the lack of reference to fishing rights in the text of the 1760-61 treaty itself.²³⁵ This perception potentially undermines the legitimacy of the Court's aboriginal rights jurisprudence more broadly and led to accusations of judicial activism that continue a decade later.²³⁶ The appeal of a "real history" is not confined to the court room. More importantly, the empirical emphasis of the jurisprudence feeds public perceptions that

²³² For a review of the fallout from *Marshall*, see Ken S Coates, *The Marshall Decision and Native Rights* (Kingston, Montreal: McGill-Queen's University Press, 2000) at 7-20. See also Russell Barsh & James [Sákéj] Youngblood Henderson, "Marshalling the Rule of Law in Canada: Of Eels and Honour" (1999) 11:1 Constitutional Forum constitutionnel 1 at 1 and 15 esp, and Harris, "Historian and Courts", *supra* note 153. For similar concerns in the Australian context, see Bain Attwood, *Telling The Truth About Aboriginal History* (Crowsnest, NSW: Allen & Unwin, 2005).

²³³ Coates, *ibid.*

²³⁴ Johnson (*supra* note 229) discusses a different problem, arguing that in creating the narrative of political equivalence, juridical history has distorted the representation of political authority within Maori society.

²³⁵ This perception was no doubt aided by the comment of the Crown's expert, Stephen Patterson to the press that the Supreme Court had misconstrued his evidence. See Harris, *supra* note 153 at 130.

²³⁶ See Alex M. Cameron, *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism* (Montreal & Kingston: McGill-Queen's University Press, 2009) and Dianne Pothier's review of this book: (2010) 33 Dalhousie L.J. 189.

Mi'kmaq treaty rights are centuries-old points of (written) agreements, rather than rights imbued with a concern for justice and reconciliation resulting from disregard for centuries-old commitments that has given rise to multi-layered historical grievances, dysfunctional political relationships, and real and unjust inequalities in the present day. The story that the jurisprudence tells about why we protect treaty rights matters. The accusations of judicial activism are troubling (and wrong-headed, in my view), as is the lack of awareness of history and Mi'kmaq experience that fuelled the aftermath of the *Marshall* decision. However, courts are situated within larger fields of public history. While courts should not pander to popular opinion, their contributions to public history should be explicit enough to educate. An empirically-presented idea of the normative concept of historical common intention cannot achieve this end.

Besides education, what is lost through the ahistorical treatment of common intention? According to Bain Attwood, opportunities for reflection and change. Writing about indigenous history and legal claims in Australia, Attwood argues that presenting the full complexity of history better serves the aims of justice.²³⁷ He describes the emergence of the 'stolen generations narrative' in Australia, constructed largely through oral history, memory, and applied forms of historical discourse. The narrative portrayed the government policy as genocidal and this narrative was broadly accepted by the

²³⁷ See, e.g., Bain Attwood, "In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History" (2005) 20 *Public Culture* 75 [Attwood, "Stolen Generations"] and Bain Attwood, "The *Law of the Land* or the Law of the Land?: History, Law and Narrative in a Settler Society" (2004) 2 *History Compass* 1.

Australian public. By contrast, Attwood contends that academic history characterizes the past policy as assimilationist.²³⁸ In his view, this disjuncture leaves the genocide narrative vulnerable to attack. The clash of historical methodologies involved in producing these opposing narratives and the continuing (and authoritative) appeal of the sharper historicism of much academic history is capable of undermining the testimony of individuals and work of the stolen generations inquiry more generally. It does not serve the ends of justice to have people's memories publicly discredited, neither for the individuals involved nor when 'sympathetic' public opinion is disrupted by evidence that their sympathies were premised on 'lies'. Similarly, the authority that the common law and common law constitutionalism draw from history is undermined when the 'truth' of the courts' history is shown to be too far from the truth produced in academic contexts.²³⁹

Equally importantly for present purposes is Attwood's further contention that a historicist account of the stolen generations policy would be more unsettling than the genocidal one. Attwood argues that there is greater potential for change in forcing settler Australia to grapple with the continuities in settler policy, in which assumptions that assimilation is for the betterment of aboriginal peoples are still prevalent:

²³⁸ It should be noted that these two characterizations of the policy may not be as distinct as Attwood assumes. It is arguable that policies aimed at destroying or eliminating a people through eliminating their culture meet the definition of genocide; see Woolford, *supra* note 123 for a discussion of the definition of genocide.

²³⁹ For discussions of the role and authority of history in the common law, see Gerald J. Postema, "On the Moral Presence of Our Past" (1990-91) 36:4 McGill L J 1153 [Postema] and Paul McHugh, "Sovereignty This Century – Maori and the Common Law Constitution" (2000) 31 Victoria Univ of Wellington L J 187.

Grasping this historical continuity and grappling with what amounted to an intimately close relationship with the approach of their allegedly do-gooding forebears or predecessors [who took aboriginal children away from their families to promote assimilation] would have been more unsettling than the sorry people's distancing of their putatively genocidal ancestors. These settler Australians might have realized that the past was in the present not only in the form of Aboriginal people affected by being separated from their kin but also in the form of a white mentalité we can call assimilationist. Understanding this could have provided a means of working through this past in the present, since it would have pinpointed the very ideas and attitudes that have contributed and continue to contribute to the destruction of Aboriginal communities and the diminution of Aboriginality by the settler society.²⁴⁰

While Attwood's "might" is an important caveat on predicting the impact of a historicist account of the stolen generations policy, his work makes the point that something is indeed lost by historical accounts that do not attend to the historical complexity of the past. If we cannot see the past clearly, it is harder to move towards a new – hopefully more just – direction. As Postema has argued in relation to the common law's reliance on precedent more generally, "if members are to take their community's history as normative for their dealings, that community must *own up* to its past, look back at the roads not taken and the suffering it has caused and hold itself accountable to them."²⁴¹ Thus, the ends of justice may be better served by a treaty jurisprudence that does not 'whitewash' the past by retrospectively imposing the honour of the Crown, or other principles aimed at fairness in the present.

²⁴⁰ Attwood, "Stolen Generations" *ibid.* at 94.

²⁴¹ Postema, *supra* note 239 at 1180.

B. Addressing the constitutional significance of treaty rights

The empirical dressing on the normative concept of common intention highlights the need to address the normative foundations for protecting treaty rights. Commentators on treaty interpretation have occasionally gazed wistfully towards contract law, noting the simplicity (and potential transferability) of well-understood normative principles such as undue influence, duress and unconscionability that are used by the court to interpret the facts of a given contract.²⁴² What they notice is the willingness of courts to interpret an agreement between parties with a view to balancing the values behind protecting freedom of contract and the ends of justice in the particular case. As Binnie J remarked in *Marshall*, “The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy....If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.”²⁴³

Binnie J’s comment suggests that if we apply normative correctives to resurrect the parties’ true (and apparently shared) intentions born of a retroactively levelled playing field, treaty rights jurisprudence will have succeeded in accomplishing its task. Serving

²⁴² See, e.g., Michael Coyle, “Marginalized”, *supra* note 43 and Claire Hunter, “New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts” (2004) 62 U Toronto Fac L Rev 61.

²⁴³ *Marshall*, *supra* note 76 at para 43.

the ends of justice in the treaty interpretation context, however, is more complex than the interpretation of contracts, due to the historical nature of the agreements and the constitutional character of the moments of agreement – and because the foundational values behind protecting historic treaty rights are arguably less understood and more contentious than the values behind protecting freedom of contract.²⁴⁴ In contract law, the value of enforcing agreements between parties may be related relatively straightforwardly to liberal values around freedom in economic relations.²⁴⁵ In the context of historic treaties, the law assumes that First Nations consent matters but does not explain why their consent matters, at what point in time, or in relation to what. In the broad scope of treaties caught by the jurisprudence, consent to land cessions or alliance (as the treaties are characterized by the court) are treated on the same plane. While the value of consent in social contract theory may be well accepted (even if the conceptualization of this consent remains highly contested²⁴⁶), the lingering implications of the nineteenth-century treaty law suggest that indigenous peoples were not part of this contract. And as described

²⁴⁴ Treaty interpretation is presumably less fraught in the present day context, but to date the Supreme Court has exhibited a deep split about how the honour of the Crown applies in the context of modern treaties, the relationship between historic and modern treaties, and the approach that will best promote reconciliation; contrast Binnie J and Dechamps J in *Little Salmon/Carmacks* and *Moses*, *supra* note 106. For commentary, see Julie Jai, “The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference” (2009) 26 Nat. J of Con L 25 and Ria Tzimas, “To What End Dialogue?” (2011) 54 SCLR (2d) 494.

²⁴⁵ No doubt a contracts law scholar could take issue with this assertion. I do not mean to imply that the values behind contract law are fully settled, immune to challenge, or that the values behind enforcing promises could not be justified outside of liberal economics. The comparison is made more for the purposes of showing the relative ease with which one can identify a normative basis for enforcing contracts. For a discussion of various contract theories see Nathan Oman, “Unity and Pluralism in Contract Law” (2005) 103 Mich L Rev 1506.

²⁴⁶ Webber, “Consent”, *supra* note 192.

above, the later s 88 and treaty rights cases avoid any direct engagement with the constitutional significance of treaties.

McLachlin CJ's statement in *Haida Nation* noted earlier – that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s 35 of the *Constitution Act, 1982*” – continues to disconnect treaty rights from the constitutional significance of treaties more generally. In this separation, treaty rights are the remainder of reconciled sovereignties, representing, perhaps, the terms of that reconciliation. In this schema, treaty rights are born of foundational moments of consent, thus explaining the Court's instinct to rely on history to define their content. But this approach further confounds normative clarity by exacerbating tensions inherent in the values supporting Canada's constitutional order; for example, between liberalism, which is fundamentally skeptical of the justice of past political relations, and common law constitutionalism, which relies on past constitutional arrangements to ground the legitimacy of political authority in the present. Moreover, this approach does not accord with the promise or history of treaty-making. In the first section of this paper, I emphasized the relational and evolutionary nature of both treaties and consent. In the second section, I argued that treaty histories were characterized by ongoing disagreements as much as by points of agreement. Bringing these discussions forward highlights to the inadequacy of conceptualizing treaty rights as products of final, complete agreements. This approach simply does not tell a constitutional story upon which more just relations can be built.

Honouring past commitments as a foundation of present day communities and legal rights is a key component of just political arrangements in a number of different philosophies and perspectives.²⁴⁷ In the case of treaties, such foundations are constitutional in more than one dimension; treaties embody both a notion of original consent and the continuity of “keeping faith with each other” through keeping treaty relationships alive.²⁴⁸ But even if there is a high degree of acceptance of the value of honouring past commitments, this value does not prescribe how to implement such commitments in the present, particularly when those commitments have suffered long periods of neglect. As Jeremy Waldron has argued, there is no straight line between historic injustice and the rectification of those wrongs in the present.²⁴⁹ Waldron is in part concerned about remedies (e.g., “giving the land back” as a straight line from the wrongful taking of land in past), and the potential to do further injustice by not taking intervening events and changes into account. While I do not agree with all aspects of his argument, he draws attention to the mediation of the consequences of the past through present-day normative principles. And a treaty jurisprudence capable of supporting the promise of treaties must develop transparent and robust normative foundations to adequately address the consequences of the past.

²⁴⁷ For e.g. James Tully, *Strange Multiplicity. Constitutionalism In An Age of Diversity* (Cambridge: Cambridge University Press, 1995); James [Sa’ke’j] Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask L Rev 29; Martin Krygier, “Law as Tradition” (1986) 5 Law and Philosophy 237; John Ralston Saul, “The Roots of Canadian Law in Canada” (2009) 54 McGill L. J. 671.

²⁴⁸ Postema, Moral Presence, *supra* note 239.

²⁴⁹ Jeremy Waldron, “Redressing Historic Injustice” (2002) 52 Univ of Toronto L J 134.

C. Re-orienting treaty interpretation

What would a treaty jurisprudence that does not focus on the reconstruction of an imagined common intention look like? Consider, as an example, the different findings of common intention and the resultant treaty rights in *Marshall*. Binnie J found a broad, ongoing right to harvest and trade fish while McLachlin J found a narrower temporary right that disappeared with the truckhouse system. Under Binnie J's approach, the treaty right re-commits the parties to a treaty relationship and constitutionalizes one particular element of that relationship: a commitment to exclusive trading relations. It relies on the honour of the Crown to bridge the past agreement to the present constitutional right, but does so in a manner that cannot fully explain how this principle serves justice in the present because it is applied to reconcile the parties' interests in the past. Moreover, the principles that guide the modernization of the past treaty promise are thinly sketched, focussing on "proportionality" of the modern to the historic to implement the past bargain without inquiring into how parties might have re-negotiated their arrangements, or taken account of developments between then and now.²⁵⁰ The jurisprudence thus not only keeps us focussed on the past, it also has gaps in the principles that move us from past to present.

²⁵⁰ Proportionality in "modernizing" rights was recently discussed in relation to aboriginal rights in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535.

Given that McLachlin J did not find an ongoing treaty right, her conclusion did not result in a remedy. But she did not deny the presence of a trade right, just the longevity of it. In her approach, the treaty right was rendered obsolete by the changed trading system. With different treaty rights principles, however, these findings of fact might also support a remedy. As our review of treaty histories suggests, much historic injustice relating to treaties was effected through neglect. These histories suggest that once a treaty right is identified, the proper inquiry is (like the principles from *R v Taylor and Williams*) what happened to the agreement and the particular right: What happened to Mi'kmaq trade and ability to access 'necessaries' once the truckhouse system was dismantled? Was the truckhouse system unnecessary because trade was secured through other systems (and so the trade right possibly survived in a modified form)? What happened to British-Mi'kmaq relations more generally? Were trade and other arrangements re-negotiated or altered through practices? Was the Crown neglectful of its treaty obligations? Or did the Mi'kmaq agree (under fair conditions) to relinquish their trading and harvesting rights? And if so, for what benefit?

Assuming for present purposes that this story encompassed some elements of Crown neglect, the narrative that emerges suggests that the treaty right remained in its historic form. The dispute is thus shifted from whether the right exists to how the right and treaty relationship were implemented and maintained over time – a diagnosis of the problem that better coheres with constitutional narratives about the significance of treaties and better explains the continuing need for corrective action by the courts. The

task for the courts remains reconstructing the historical relationship and its specific terms, but aimed only at defining the historical right as a platform for the parties' negotiations.²⁵¹ Remedial attention is thus also shifted to causing the parties to bring the relationship into good standing, with a guarantee of ongoing historical rights (or perhaps damages for the loss of ability to exercise historical rights) looming as the default 'hammer' to ensure negotiations proceed, but without the pretension that such historical rights fully represent the constitutional significance of treaties or fully define the shape of treaty rights in the present. Such remedies are perhaps already available under the honour of the Crown. In *Haida Nation* for example, McLachlin CJ made it clear that the honour of the Crown applies to treaty-making, treaty interpretation, and treaty implementation.²⁵²

What is absent from this example is attention to how historic rights would be identified in cases where the record does not establish the presence of a historic treaty right, such as when treaty rights are claimed based on oral promises not reflected in the treaty text. In these cases, the generous interpretive principles still have much to offer,

²⁵¹ An approach that is perhaps similar to Vickers J's approach with respect to aboriginal title in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700. For discussion, see Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia*" (2010) 8 Indigenous L J 7.

²⁵² *Haida Nation*, *supra* note 193 at paras 17, 19. See also *Mikisew Cree*, *supra* note 118 regarding the honour of the Crown applying to treaty implementation. See also *Inuit of Nunavut v. Canada (Attorney General)*, 2012 NUCJ 11, in which the Nunavut court ordered a disgorgement of damages of nearly \$15 million for failures on the part of the federal government in implementing the Nunavut Land Claim Agreement. The remedy was based on the finding that the honour of the Crown in this circumstance gave rise to a fiduciary duty in relation to the implementation of the agreement. The honour of the Crown was also argued to inform the remedy: "To uphold the 'honour of the Crown', this Court should grant a remedy that deprives Canada of the benefit it received in failing to set up and implement the NGMP in a timely manner" (at para 207). The court would have found the same remedy for a breach of contract had the fiduciary claim failed.

particularly if aimed at shared meaning and intentions on a broader scale. Mark Walters notes that a broader view of common intention, based on customs and practices rather than treaty texts and reports, would allow for a greater possibility of locating shared meanings in the treaties.²⁵³ In this approach, the asserted historic treaty right would be evaluated against a longer historical framework of relations and mutual intention or shared meanings may have more in common with *Sioui* than *Marshall*. Walter's approach is also similar to Brian Slattery's notion of "generic" aboriginal rights that emerged from intersocietal law and practices, and against which distinctive specific rights evolved through negotiations and other developments.²⁵⁴ And in a similar vein, Shin Imai has proposes a two-stage process to implement "taking up lands" clauses that relies on a more generalized view of treaty rights that better reflects the nature of the bargain struck in historic agreements.²⁵⁵ The first stage would analyze the substance of the treaty right "not as a series of individual rights, but as a guarantee of collective survival."²⁵⁶ The second stage would then focus on the measures necessary to secure the viability and access to the resource that was promised to support collective survival. All of these approaches suggest that the court by-pass the identification of mutual intention on narrow, specific rights in

²⁵³ Walters, "Covenant Chain", *supra* note 212 at 89.

²⁵⁴ Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Supreme Ct. L. Rev. 595 [Slattery, "Generative Structure"].

²⁵⁵ Shin Imai, "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 Queen's L J 1.

²⁵⁶ *Ibid.* at 24.

favour of greater attention to the intentions around and parameters of the working relationship to define the historic element of a treaty right.

The directions suggested above share much in common with Brian Slattery's theory of the generative structure of aboriginal rights.²⁵⁷ He defines generative rights as "rights that, although rooted in the past, have the capacity to renew themselves, as organic entities that grow and change."²⁵⁸ According to Slattery, aboriginal rights consist of two elements: core generic rights that are common to all aboriginal peoples, and specific rights, which develop through treaties and other processes to be distinctive to particular aboriginal groups. These rights are identified by courts through "principles of recognition," which take account of historical intersocietal law and the emergence of generic rights to "provide the point of departure for any modern inquiry into the existence of Aboriginal rights and a benchmark for assessing the historical scope of indigenous dispossession and deprivation."²⁵⁹ The modern and adaptive aspects of the rights are then identified through principles of reconciliation, which guide the transit of the historic rights through changes such as the community's contemporary needs, changes to implicated lands and resources, and broader societal and third party interests.²⁶⁰ Slattery's approach accomplishes several things that have been suggested as desirable directions for the conceptualization and interpretation of treaties and treaty rights. First, by bridging the

²⁵⁷ Slattery, "Generative Structure", *supra* note 254.

²⁵⁸ *Ibid* at 593.

²⁵⁹ *Ibid* at 623.

²⁶⁰ *Ibid.* at 624.

treaty term with the longer history of Aboriginal rights as products of intersocietal practices and law, he brings the genealogy of the treaty to bear on the interpretation of the treaty itself and the right that is protected under s. 35. But in the generative model, history informs but is not determinative. History is not the sole constitutive element of the right and the articulation of rights does not strain history for answers it may not be able to produce. In place of the sole emphasis on history, Slattery's account introduces greater transparency and specificity around the normative character of aboriginal and treaty rights through encouraging the development of explicit principles of recognition and reconciliation.²⁶¹ This approach provides a more transparent, and therefore more readily debated, account of why aboriginal and treaty rights should be protected. Regardless of whether one agrees with these principles, this transparency is critical in shifting treaty rights litigation away from its empirical fixation on the past and exploring the appropriate interpretive principles for serving the ever-debatable ends of justice in the present.²⁶² Finally, Slattery's approach also attends to an aspect of aboriginal rights jurisprudence that is largely missing in the treaty context, which is the need to support negotiations. He argues that in light of the diverse interests involved in the principles of reconciliation, "certain Aboriginal rights cannot be implemented in their entirety by the

²⁶¹ Slattery suggests that these principles should be developed within the context of actual cases while identifying several potential features of those principles; *ibid* at 625-6.

²⁶² Slattery makes a similar point in relation to aboriginal rights and the *Van der Peet* test; *ibid.* at 610.

courts but require the negotiation of modern treaties,”²⁶³ emphasizing the need to negotiate the resolution of aboriginal title specifically.

Two differences from Slattery’s approach are proposed in the discussion above. First, I proposed that the requirement of negotiation to bring the historic right into the modern form applies equally to treaty rights. Taking note of the remarkable uniformity of scholars who envision treaties as living relationships involving ongoing negotiations, negotiated settlements to treaty rights are imperative. Envisioned as part of the definition of the treaty right itself, rather than as a manner by which the Crown might justify an infringement (within its proper jurisdiction), negotiated settlements of historic treaty rights are required to re-invigorate the treaty relationship. Only through the imposition of consultation obligations in relation to “taking up clauses” has the dialogic element of treaty rights and processes been recognized.²⁶⁴ This lack of attention is reminiscent of the colonial hangover that continues to characterize treaty histories, discussed above. In these accounts, treaties are a *fait accompli*; there can be no need to negotiate if treaty rights have already been negotiated.²⁶⁵ Negotiated approaches to treaty rights – their modern scope, nature, and implementation – are as necessary in treaty contexts as in non-treaty contexts. Second, the discussion above proposed a shift in focus regarding remedies. The remedial focus should not be on the treaty right itself, but on the treaty relationship. As

²⁶³ *Ibid.* at 624.

²⁶⁴ *Mikisew Cree*, *supra* note 118.

²⁶⁵ This conceptualization was reflected in *Mikisew Cree*, where the Supreme Court suggested that the Crown would always have notice of the treaty rights contained in a treaty (*supra* note 118 at para 34)

such, courts that are asked to resolve treaty rights disputes should supervise the negotiation of the contemporary form and accommodation of the rights they identify and step in to resolve the modern form of these rights only after negotiations fail.

4. Conclusion

This paper has travelled a long road to consider the conceptualization of treaties in history and then in law, and evaluate them against constitutional narratives that rely on treaties and treaty processes to suggest post-imperial foundations for the modern state of Canada. In spite of several decades of public commissions and scholarship articulating and advocating for understanding treaties as living, evolving relationships, these directions have yet to be adequately incorporated into treaty narratives in history or law. Historical treatments of specific treaties show greater attention to indigenous agency, but this highly contextual scholarship is not fully reflected in surveys of the vast scope of treaty-making experience in Canada's history. This experience continues to be organized around colonial interests and landmarks. To move beyond such colonial hangovers, I have argued that indigenous understandings of treaty histories must be incorporated and respected, which will be facilitated by discarding subject matter classifications such as peace and friendship versus land cession treaties, and chronological lines, such as pre- and post-confederation versus modern treaties. I also argued that, as iterative and cumulative processes, treaty histories must include both fur trade ordering and modern

quasi-treaty developments. An inclusive approach has the benefit of incorporating additional geographies and indigenous forms of treaty relations more centrally in treaty histories. From these arguments, I suggested that treaty-making histories in Canada would be better represented by surveys that attend to significant moments of transformation or re-iteration of existing relationships and are thus capable of expressing the incompletely resolved nature of treaty relations.

Similarly, legal treatments of treaties have similarly not fully discarded nineteenth century characterizations of treaties as a matter of executive goodwill rather than processes and relationships that were and are an essential contribution to the founding of the state. While the duty to consult jurisprudence suggests that treaties involve ongoing processes that support an ongoing reconciliation of indigenous and Crown sovereignties, the treaty rights cases in the post-1982 era do not support a similar vision. By focusing the inquiry on common intention as coalescing around particular treaty terms, lead cases such as *Marshall* and *Marshall; Bernard* since 1982 have disconnected treaty rights from treaty relationships, demonstrating an approach that situates treaty rights as empirically-discoverable terms of a fully reconciled relationship. Treaty rights as factual terms of an original consent demands that those historical moments be carried into the constitutional present without attention to problems that stem from implementation, disagreements about the scope of treaty rights and relationships, or the normative basis for honouring those past commitments.

Drawing on similar critiques and prescriptions by other legal scholars, I suggest an approach to the treaty rights jurisprudence that attends to historical interpretation of mutual intentions to enter into and maintain treaty relations but does not rely on common intentions regarding the meaning and scope of the terms of that relationship to define treaty rights. Where Brian Slattery has considered a history of intersocietal law as the historical backdrop informing the development of aboriginal rights, I have instead encompassed the evolution of intersocietal law in a treaty framework, emphasizing the negotiated nature of these intersocietal foundations and the iterative processes between negotiated moments as part of treaty processes more generally. This move expands the historical context against which treaty practices might be identified, drawing the historical argument for an inclusive approach to histories into law. It also builds on constitutional narratives of treaty as relationship that promise an alternative to Imperial constitutional foundations. From these positions, I argue that treaty rights must be interpreted with a view to re-invigorating treaty relationships, and that such an approach demands that the parties negotiate the modern parameters of a treaty right under Court supervision. Thus, the Court's role in interpreting treaty rights maintains attention to the historical substance of the parameters and terms of treaty relationships but is re-oriented to supporting constitutional processes — and improved treaty relationships — in the present.

By tracing these concerns through both law and history, common themes emerge. The challenge presented by the constitutional narratives of treaties is to resist treaties as

moments of resolution and embrace treaties as potentially encompassing as much disagreement as agreement. This vision is perhaps more of a challenge to law than history. In the latter, there is no need to finally resolve historical disputes. In law, however, resolving disputes are precisely what courts are called upon to do. Further, the challenge of managing a national narrative that encompasses deep disagreements about the founding of the state and the legitimacy of its current authority should not be understated. The courts, I suggest, have a privileged role in contributing to this narrative. As is common in the field of aboriginal law, treaty rights disputes call upon the courts to resolve disputes that go to the foundations of the Canadian constitutional order. Such tasks demand that courts muster all of the creativity of the law that is available to them, including fashioning new remedies from time to time. In this paper, I have argued that the courts' creative energies should be enlisted to support treaty relationships by interpreting treaty rights as a support for ongoing treaty relationships, rather than as representing the terms of a long stale settlement. Through the duty to consult, the Supreme Court has recognized that the ground is always shifting in an agenda of reconciliation. Carrying this recognition into the treaty rights jurisprudence would go a long way to establishing a treaty jurisprudence capable of supporting the promise of treaties.

Chapter 6: Conclusions

The preceding chapters use different methodologies, cover different eras and geographies, and address different audiences. Coherence is found in their ultimate objects of study: how indigenous peoples and European traders managed their relationships, and the formation and role of law in those processes. Intersocietal law has been used to describe the nature of law in these contexts. This dissertation has taken up the challenge of a grounded, historical exploration of the concept against the backdrop of how intersocietal law has been incorporated in the aboriginal rights jurisprudence and related scholarly writing. It is a concept that has been relied on to explain and ground the historical source of aboriginal rights, thereby embedding indigenous contributions within the common law rights.¹ It is also a concept that has been relied upon to express the argument that, morally as well as legally, aboriginal rights must incorporate and express both indigenous and common law legal traditions.²

This dissertation provides reflection on both applications of intersocietal law. First I explored the nature of intersocietal law through the intersection of legal traditions in case studies on the fur trade, providing historical content from which to reflect on the nature

¹ See, e.g., Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Cdn Bar Rev 196; Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L J 623; *R v Van der Peet*, [1996] 2 SCR 507 at para 42.

² John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L J 470; Patricia Monture "Now That the Door is Open: First Nations and the Law School Experience" (1990) 15 Queen's L J 179.

and dynamics of a non-rights based *modus vivendi*. These explorations contribute to ethnohistorical literature, adding law as a dimension of fur trade relations and as an element of historical experience that can help elucidate the perspectives of those not well represented in the historical record. As legal history, these case studies consider indigenous law rather than focusing on the application of law to indigenous individuals and peoples, thus ‘decentring’ the study of legal history away from colonial and imperial institutions and doctrines. These studies also provide reflection on constitutional and treaty literatures, which rely on historical claims and narratives to prescribe post-imperial directions for Canadian society and constitutional law. In the case studies, I offer an interpretation of intersocietal law as characterized by the persistence of different and competing norms and normative frameworks, which nevertheless support the general stability of relationships. In the chapter on treaties, I carry this persistence of competing norms and interpretations into an argument regarding the problematic characterization of treaties as historical phenomena and the resulting legal interpretation of the rights secured by treaties.

This interpretation of intersocietal law strongly reflects the characterization of treaties as relationship by indigenous and constitutional scholars. It also resonates – perhaps oddly in light of the different political institutions and economies of contemporary Canada – with the work of political theorists who consider contemporary processes of reconciliation to be characterized by dissent and contestation rather than by a point of political transformation at which differences are finally resolved. Finally, and

although not the direct object of study, the interpretation of intersocietal law in the case studies has legal import in the implications it has for sovereignty: the nature of indigenous expressions of jurisdiction and sovereignty in the fur trade; how the activities and practices of European traders supported the establishment of *de facto* if not *de jure* sovereignty; and the territorial and jurisdictional scope of European sovereignty established through the fur trade. In the times and geographies considered, expressions of indigenous sovereignty were strong and, beyond the governance of internal trading post affairs, company expressions of sovereignty were equivocal.³ The Mackenzie Valley case study in chapter four tackled this theme most directly, but chapters two and three also illustrate the limited authority of the company traders in the territories in which they worked and the overt and subtler assertions of power by indigenous traders in the course of the trading relationships. In keeping with my contextual methodology, it would be necessary to aim directly at the subject of sovereignty to draw conclusions about whether a measure of sovereignty was acquired through the activities of traders at particular trading posts. Having not trained my sights directly on this issue, I can offer only a general observation that the stable presence of trading posts may be a source of prescriptive or settler rights in common law legal traditions, but indigenous welcome into territory cannot be presumptively equated with a cession of sovereignty in indigenous

³ See Edward Cavanagh, "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670-1763" (2011) 26 Can. J of L. & Soc'y 25 for an argument of HBC trading posts establishing a limited sovereignty beyond trading posts in relation to Home Indian populations prior to 1763.

legal traditions. Like other aspects of my interpretation of the intersocietal law of the fur trade, claims of sovereignty rely on competing normative systems and we can find evidence in fur trade relations that support both sets of claims.

Following the case studies, the project switches to consider more directly the legal implications of the legal ethnohistory of the fur trade in relation to aboriginal rights. Although inspired by common law and indigenous law arguments about aboriginal rights, my methodology and intent are strongly contextualist and not aimed at supporting a particular legal or philosophical argument regarding aboriginal rights. Nevertheless, the narratives of adaptation, mutual interest in the relationship, and persistent and unresolved difference suggested by these case studies have strong ties to constitutional writings about treaties, and the importance of treaties in grounding a post-imperial constitutional order in Canada. These connections, as well as the more particular historical connections between fur trade and treaty argued by historians of indigenous-settler relations, lead to the consideration of what an intersocietal understanding of fur trade legal ordering might demand of both historical and legal conceptualizations of treaties in chapter 5.

The focus on treaties as well as the interpretation offered of intersocietal law introduce a subtle shift in the how the concept of intersocietal law contributes to understanding aboriginal rights. To the theories that place intersocietal law as a historical source of aboriginal rights, I have added the important caveat that the normative parameters of indigenous-settler relations were not settled even if historical practices were absorbed and reflected upon in the common law or constitutionalized aboriginal

rights. Potentially fundamental disputes – such as over sovereignty – are thus carried forward into the aboriginal rights jurisprudence, where they remain unresolved. Treaties, broadly construed, provide a shared legal house in which different legal traditions may co-exist and the work of co-existence can be furthered. In addition, focusing on treaty relationships better reflects historical interpretations of treaties, constitutional writing about treaties, and present developments around consultation and the proliferation of agreement making. From these arguments, I attempt to develop an account of a treaty rights jurisprudence that is coherent with a narrative of the ongoing negotiation of treaty relationships. I argue that to be capable of re-invigorating treaty relationships, courts should not attempt to correct years of neglect by ‘modernizing’ historical rights and imposing common intentions too narrowly. Instead, courts should support treaty relationships by defining the historical terms of the relationship and supervising the re-negotiation of those relationships in the present.

The writing of these pieces has taken place over a period of eight years, in fits and starts. Each time I started again, there were new developments in the relevant literatures to take into account. In ethnohistory and history, new literature on the fur trade and particular indigenous peoples offer new insights and more material to bring to bear on the studies conducted for this dissertation.⁴ In histories of indigenous-settler relations,

⁴ See, e.g., Carolyn Podruchny, *Making the Voyageur World: Travelers and Traders in the North American Fur Trade* (Lincoln: University of Nebraska Press, 2006); Carolyn Podruchny and Laura Peers, eds, *Gathering Places: Aboriginal and Fur Trade Histories* (Vancouver: UBC Press, 2010); Jennifer Brown, “Rupert’s Land, *Nituskeenan*, Our Land: Cree and English Naming and Claiming around the Dirty Sea” in

increasing attention to the intersection of law and history has brought the fur trade more centrally into treaty histories.⁵ Critical scholarship from a variety of disciplines continues to address the legitimacy of Canadian sovereignty and advocate for a post-colonial or post-imperial constitutional order. These critiques stem from new fields of history, such as the study of settler colonialism.⁶ Closely related to post-colonial studies but centred primarily on the settler states of Canada, Australia, New Zealand, the United States, and Israel, this field pursues transnational accounts of settler colonialism, highlighting the ongoing presence of colonial history in settler states.⁷ Alongside these studies – generally from within or in conversation with liberal philosophical traditions but also drawing heavily on indigenous writers – is continued attention to the problems of reconciliation in

Ted Binnema and Susan Neylan, eds, *New Histories for Old: Changing Perspectives on Canada's Native Pasts* (Vancouver: UBC Press, 2007) 18; and Heidi Bohaker, "Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701" (2006) 63 *William and Mary Quarterly* 23.; Chris Anderson, "Moya 'Tipimsook ('The People Who Aren't Their Own Bosses')": Racialization and the Misrecognition of "Métis" in Upper Great Lakes Ethnohistory" (2011) 58 *Ethnohistory* 37.

⁵ See, e.g., Arthur J. Ray, Jim Miller & Frank J. Tough, *Bounty and Benevolence: A Documentary History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000); Arthur J. Ray, *Telling it to the Judge. Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011); J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009). With respect to the intersection of law and history more generally, see William C. Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928. The King v Gabriel Sylliboy* (Toronto: University of Toronto Press, 2012).

⁶ Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Palgrave MacMillan, 2010). See also the new journal, *Settler Colonial Studies*, established in 2011 (online:

<<http://ojs.lib.swin.edu.au/index.php/settlercolonialstudies>>)

⁷ See, e.g., Edward Cavanagh, "History, Time and the Indigenist Critique" (2012) 37:8 *Arena Journal* 16; and Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010).

settler societies and the difficulty of arriving at a post-imperial constitutionalism.⁸ These conversations are broader than the focus of the papers in this dissertation, but treaty practices figure prominently in these accounts because treaties offer a constitutional form capable of replacing the colonial doctrines upon which the political authority of the state has been built, and through which improved relations with indigenous peoples and reconciliation of sovereignties might be pursued.

Paralleling developments in academia, there has been a groundswell towards process-oriented solutions in public law that has coincided with the enlargement of the s 35 duty to consult and accommodate aboriginal peoples, mandated by *Haida Nation v British Columbia*.⁹ Responses in the legal literature generally welcome such developments as offering a dialogic approach to renewed relationships, including, potentially, the acknowledgment of unreconciled sovereignties and a path to a post-imperial constitutionalism.¹⁰ But this literature also points out the ongoing limitations of the aboriginal rights doctrines and a duty to consult that does not require indigenous consent.¹¹ At the same time, the legal literature on indigenous legal traditions has grown

⁸ Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford, New York: Oxford University Press, 2008); James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008), vol 1; Andrew Schaap, "Agonism in Divided Societies" (2006) 32 *Philosophy & Social Criticism* 255.

⁹ *Haida Nation v British Columbia*, 2004 SCC 73, [2004] 3 SCR 511.

¹⁰ See, e.g., James [Sa'ke'j] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72 *Sask L Rev* 29; and Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's L J* 470; Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).

¹¹ Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 *Windsor Yearbook of Access to Justice* 17 and Minnawaanagogiizhigook (Dawnis

exponentially since this project began.¹² This literature has different ends but also contributes to a post-imperial legal order by ensuring that indigenous legal orders are understood and relied upon as living legal traditions.

While the amount of literature produced during the time span of my project is a lesson in why one should pursue doctoral projects more quickly, these literatures have also provided me with the inspiration to complete this work. Fortunately, and remarkably from my perspective, the developments in the many fields of study that my project touches upon and responds to appear to have made my project more, rather than less, relevant. It is a study of dialogical and agonistic processes in fur trade relations that aims to give indigenous law and indigenous actors their proper (and equal) place in the Canadian legal history and constitutional law. It adds the dimension of law and legality to studies of fur trader and indigenous-settler relations. It also presents a study of geographies and eras that do not fit easily in settler-colonial patterns: the fur traders were

Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77; Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Supreme Court Law Review 595; and Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?" (2007) 37 Supreme Court Law Review (2d) 177.

¹² See, for e.g., John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria Faculty of Law, 2009); Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 195; Johnny Mack, "Hoquotist: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson, and Jeremy Webber, eds, *Storied Communities. Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2010) 287; and, Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM thesis, University of Alberta Faculty of Law, 2009) [unpublished].

merchants not settlers, highlighting the contradictions in the traditional colonial theories in which the acquisition of settler sovereignty is premised upon the traders' activities.

Against all of these intellectual developments, the law has also changed but not in a manner that reflects the critical and historical literatures. Instead, the Canadian aboriginal rights jurisprudence post-1996 appears to have responded more to theoretical developments around deliberative democracy and liberal theory, turning away from its British imperial roots. Studying this deep history and the settler colonial literature in particular makes this turn in the jurisprudence more obvious. Motivated by this critical literature, my analysis of the treaty rights jurisprudence confirms the settler colonial critique that colonialism continues to structure our politics and law, and that relinquishment of domination has not yet been achieved. And yet, in line with the optimism inherent in legal writing, and demonstrating that law remains my "home" discipline, this dissertation is not solely critical. Law may yet serve to correct injustices imposed and enforced by law. Reconfiguring Canadian aboriginal rights jurisprudence to accept deep and ongoing contestations as a matter of history and law would go a long ways towards achieving this aim.

Bibliography

PRIMARY MATERIALS

Archival Materials

HUDSON'S BAY COMPANY ARCHIVES, WINNIPEG

York Factory Trading Post Journals

- B. 239/a/1-4 (1714-18), microfilm reel 1M 154
- B. 239/a/8-11(1724-28), microfilm reel 1M 155
- B. 239/a/16-21 (1734-38), microfilm reel 1M 155
- B. 239/a/24-26 (1742-45), microfilm reel 1M 156
- B. 239/a/28-30 (1746-48), microfilm reel 1M 156
- B. 239/a/32-33 (1748-50), microfilm reel 1M 156
- B. 239/a/40-41 (1756-57), microfilm reel 1M 156
- B. 239/a/42 (1757), microfilm reel 1M 157

York Factory, Correspondence Inwards

- B. 239/b/1-5, microfilm reel 1M 254

York Factory, Correspondence Inwards,

- A. 11/114, microfilm reel 1M 665

London Correspondence Outwards

- A. 6/1-4 (1679-1726), microfilm reel 36

Memorial Books

- A. 9/1-7, microfilm reel 54

Fort Good Hope Trading Post Journals

- B 80/a/1-6 (October 1822- July 1827), microfilm reel 1M58

Fort Simpson Trading Post Journals

- B. 200/a/1-3, (July 1822- October 1823), microfilm reel 1M139
- B. 200/a/2, *John M McLeod, Occurrences of Voyage to the Nahany Lands, 1823*, microfilm reel 1M139

Fort Simpson Correspondence Books

- B. 200/b/1-3 (1825-26, 1826-27), microfilm reel 1M 225

LIBRARY AND ARCHIVES CANADA

RG 10, vol. 4042, microfilm reel C-10178, Treaty 11 Correspondence

Published Primary Materials

Canada. "Relation of the Voyage of Pierre Esprit Radisson to the North of America in the years 1682 and 1683" by Pierre Esprit Radisson in "Report of the Minister of Agriculture for the Dominion of Canada, 1895," *Sessional Papers*, no. 8a (Ottawa, 1896).

Davies, K.G., ed. *Letters from Hudson Bay, 1703-40* (London: Hudson's Bay Record Society, 1965) 252.

Douglas, R. & J.N. Wallace, eds. *Twenty Years of York Factory, 1694-1714: Jérémie's Account of Hudson Strait and Bay* (Ottawa: Thorburn and Abbott, 1926).

Keith, Lloyd. *North of Athabasca. Slave Lake and Mackenzie River Documents of the North West Company, 1800-1821* (Montreal & Kingston: McGill-Queen's University Press, 2001).

Masson, L.R., ed. *Les Bourgeois de la Compagnie du Nord-Ouest*, vol. 2, (New York: Antiquarian Press, 1960).

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Calgary: Fifth House, 1991; first published 1880).

Oldmixon, John. *The British Empire in America*, vol. 1 (London: John Nicholson, 1708).

Oldmixon John. "The History of Hudson's Bay" in J.B. Tyrrell, ed, *Documents Relating to the Early History of Hudson Bay* (New York: Greenwood Press, 1968 [1931]) 371.

Rich, E.E., ed. *James Isham's Observations on Hudsons Bay, 1743 and Notes and Observations on a Book Entitled "A Voyage to Hudson Bay" in the Dobbs Galley, 1749* (Toronto: Champlain Society, 1949).

---. *Copy-book of Letters Outward &c. Begins 29th May, 1680 Ends 5 July, 1687* (Toronto: Champlain Society, 1948).

Scull, Gideon D, ed. *Voyages of Peter Esprit Radisson* (New York: Burt Franklin, 1967).

Thwaites, Reuben Gold, ed. *The Jesuit Relations and Allied Documents*, vol. 22 (New York: Pageant Book, 1959).

Wallace, W. Stewart, ed. *The Present State of Hudson's Bay by Edward Umfreville* (Toronto: Ryerson Press, 1954).

Williams, Glyndwr, ed. *Andrew Graham's Observations on Hudson's Bay, 1767-91* (London: Hudson's Bay Record Society, 1969).

Jurisprudence

Amodo Tijani v Southern Nigeria (Secretary), [1921] 2 AC 399.

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

Canada v Benoit, 2003 FCA 236, 228 DLR (4th) 1.

Cherokee Nation v Georgia, 30 U.S. (5 Pet.) 1 (1831).

Chippewas of Sarnia Band v Canada (Attorney General) (2000), 51 OR (3d) 641, [2001] 1 CNLR 56 (Ont Sup Ct).

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 195 DLR (4th) 135, [2001] 1 CNLR 56, [2000] OJ No 4804 (QL) (Ont CA).

Connelly v Woolrich (1867), 17 RJRQ 75.

Delgamuukw v British Columbia, [1997] 3 SCR 1010.

Dreaver v The King, (1935) 5 CNLC 92 (Exchequer Court).

Eastmain Band v Robinson (1992), 99 DLR (4th) 16 (Fed CA).

Ermineskin Indian Band v. Canada, 2005 FC 1623.

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9, [2009] 1 SCR 222.

Francis v the Queen, [1956] SCR 618.

Gitanyow First Nation v Canada, [1998] 4 CNLR 47 (BCSC).

Guerin v The Queen, [1984] 2 SCR 335.

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.

Hul'qumi'num Treaty Group v Canada, Organization of American States Inter-American Commission on Human Rights, Case No. 12.374, Report on Admissibility No. 105/09.

Inuit of Nunavut v Canada (Attorney General), 2012 NUCJ 11, 2012 CarswellNun 16 (WL).

Johnson v M'Intosh, 21 US 543, 8 Wheat 543 (1823).

Johnston v The Queen, (1966), 56 DLR (2d) 749.

Keewatin v Minister of Natural Resources, 2011 ONSC 4801.

Kinloch v The Secretary of State for India in Council (1881-82), 7 App Cas 619.

Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56, [2011] 3 SCR 535.

Logan v Styres (1959), 20 DLR (2d) 416, 1959 CarswellOnt 228 (WL) (Ont HC).

McIvor v The Registrar, Indian and Northern Affairs Canada, 2007 BCSC 827.

Mikisew Cree First Nation v Canada (Minister of Heritage), 2005 SCC 69, [2005] 3 SCR 388.

Mitchell v Minister of National Revenue, 2001 SCC 33, [2001] 1 SCR 911.

Nireaha Tamaki v Baker, [1901] AC 561.

Ontario v Canada (Annuities Case) (1895), 25 SCR 434, [1895] SCJ No 96 (QL).

Ontario v Canada (Annuities Case), [1897] AC 199, [1896] JCJ No 4 (QL).

Paul v Canada, 2002 FCT 615.

Pawis v The Queen (1979), 102 DLR (3d) 602 (FCTD).

Quebec (Attorney General) v. Moses, 2010 SCC 17, [2010] 1 SCR 557.

R. v Bernard; R v Marshall, 2005 SCC 43, [2005] 2 SCR 220.

R v Côté, [1996] 3 SCR 139.

R v. Horseman, [1990] 1 SCR 901.

R v Marshall, [1999] 3 SCR 456.

R v Morris, 2006 SCC 59, [2006] 2 SCR 915.

R v Simon, [1985] 2 SCR 387.

R. v Sioui, [1990] 1 SCR 1025.

R v Syliboy, [1929] 1 DLR 307, [1928] NSJ No 8 (QL) (NS Co Ct).

R v Taylor and Williams (1981), 34 OR (2d) 360, [1981] 3 CNLR 114.

R v White and Bob (1964), 50 DLR (2d) 613 (BCCA).

R v Van der Peet, [1996] 2 SCR 507.

R v Wesley (1932), 26 Alta LR 433, [1932] 4 DLR 774, 1932 CarswellAlta 20 (WL).

R v Wesley (1975), 9 OR (2d) 524, 1975 CarswellOnt 452.

Re Paulette et al and Registrar of Land Titles (1973), 42 DLR (3d) 8, [1973] 6 WWR 115.

St. Catherine's Milling v Ontario (Attorney General) (1888), 14 App Cas 46, [1888] JCJ No 1(QL).

Sawridge Band v Canada (1995), [1996] 1 FC 3 (TD).

Sawridge Band v Canada, [1997] 3 FC 580 (CA).

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550.

Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700.

Victor Buffalo v Canada, 2005 FC 1622, [2006] 1 CNLR 100.

Wi Parata v Bishop of Wellington (1877), 3 NZ Jur (NS) Sc 72.

William v British Columbia, 2012 BCCA 285.

Worcester v Georgia, 31 US (6 Pet) 515 (1832).

Legislation

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

The Indian Act, RSC 1985, c I-5.

SECONDARY MATERIAL

Books

Anaya, S. James. *Indigenous Peoples in International Law*, 2d ed. (Oxford University Press, 2004).

Attwood, Bain. *Telling The Truth About Aboriginal History* (Crowsnest, NSW: Allen & Unwin, 2005).

- Axtell, James. *Natives and Newcomers: The Cultural Origins of North America* (New York: Oxford University Press, 2001).
- Backhouse, Constance. *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 1999).
- Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002).
- . *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010).
- Binnema, Theodore. *Contested and Common Ground: A Human and Environmental History of the Northwestern Plains* (Norman: University of Oklahoma Press, 2001).
- Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).
- . *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).
- Brown, Jennifer. *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980).
- & Elizabeth Vibert, eds. *Reading beyond Words: Contexts for Native History* (Peterborough, ON: Broadview Press, 1996).
- Cameron, Alex M. *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism* (Montreal & Kingston: McGill-Queen's University Press, 2009).
- Cardinal, Harold & Walter Hildebrant, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).
- Carr, Edward. *What is History* (New York: Vintage Books, 1961).
- Carter, Sarah. *Lost Harvests. Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990).
- Chakrabarty, Dipesh. *Provincializing Europe Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000).

- Clendinnen, Inga. *Ambivalent Conquests: Maya and Spaniard in Yucatan, 1517-1570*, 2d ed, (Cambridge: Cambridge University Press, 2003 [1987]).
- Coates, Ken S. *The Marshall Decision and Native Rights* (Kingston, Montreal: McGill-Queen's University Press, 2000).
- Constitutional Law Group, eds, *Canadian Constitutional Law*, 4th ed (Emond Montgomery, 2010).
- Devine, Heather. *The People Who Own Themselves. Aboriginal Ethnogenesis in a Canadian Family, 1660-1900* (Calgary: University of Calgary Press, 2004).
- Dickason, Olive Patricia. *Canada's First Nations: A History of Founding Peoples* (Toronto: McClelland and Stewart, 1992).
- Drummond, Susan G. *Mapping Marriage Law in Spanish Gitano communities* (Vancouver: UBC Press, 2006).
- Fitzpatrick, Peter. *Modernism and the Ground of Law* (Cambridge: Cambridge University Press, 2001).
- Foster, Hamar, Benjamin L. Berger, & A.R. Buck, eds. *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008).
- Ford, Lisa. *Settler Sovereignty: jurisdiction and Indigenous Peoples in American and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010).
- & Tim Rowse, eds. *Between Indigenous and Settler Governance* (London & New York: Routledge, 2012).
- Fournier, Martin. *Pierre-Esprit Radisson: Merchant Adventurer, 1636-1710* (Sillery, QC: Septentrion, 2002).
- Francis, Daniel & Toby Morantz. *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600-1870* (Montreal and Kingston: McGill-Queen's University Press, 1983).
- Fumoleau, René. *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, rev. ed. (Calgary: University of Calgary Press, 2004 [1975]).
- Gibson, Dale & Lee Gibson. *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis, 1972).

- . *Privatized Justice: the Origins of Legal Institutions on the Canadian Prairies* (Winnipeg: University of Manitoba, Faculty of Law, 1993).
- Grammond, Sébastien. *Identity Captured by Law. Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal-Kingston: McGill-Queen's University Press, 2009).
- . *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Éditions Y. Blais, 1995).
- Harring, Sidney. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998).
- Harris, Douglas C. *Landing Native Fisheries. Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008).
- . *Fish, Law and Colonialism. The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).
- Havard, Gilles. *Empire et Métissages: Indiens et Français dans le Pays d'en Haut, 1660-1715* (Sillery, Paris: Les Éditions du Septentrion et Presses de l'Université de la Paris-Sorbonne, 2003).
- Helm, June. *The People of Denendeh : Ethnohistory of the Indians of Canada's Northwest Territories* (Iowa City, IA: University of Iowa City, 2000).
- Henderson, James [sa'ke'j] Youngblood. *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007).
- Hendrix, Burke A. *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (Pennsylvania State University Press, 2008).
- Hoehn, Felix. *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).
- Hogg, Peter W. *Constitutional Law of Canada*, 2012 Student ed. (Toronto: Carswell, 2012).
- Iverson, Duncan. *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).
- Jones, Dorothy V. *License for Empire. Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982).

- Keith, Lloyd. *North of Athabasca. Slave Lake and Mackenzie River Documents of the North West Company, 1800-1821* (Montreal & Kingston: McGill-Queen's University Press, 2001).
- Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995).
- . & Bashir Bashir, eds. *The Politics of Reconciliation in Multicultural Societies* (Oxford, New York: Oxford University Press, 2008).
- Long, John S. *Treaty No. 9. Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen's University Press, 2010).
- Loo, Tina. *Making Law, Order and Authority in British Columbia 1821-1871* (Toronto: University of Toronto Press, 1994).
- Lutz, John S. *Makúk. A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008).
- Lytwyn, Victor P. *Muskegowuck Athinuwick: Original People of the Great Swampy Land* (Winnipeg: University of Manitoba Press, 2002).
- MacIntyre, Alisdair. *After Virtue: A Study in Moral Theory*, 2nd Edition (Duckworth, 1993).
- Mackenzie, N.A.M. "Case and Comment: Indians and Treaties in Law (*Rex v Syliboy*)" (1929) 8 Canadian Bar Review 561.
- Macklem, Patrick. *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).
- Mandelbaum, David G. *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, University of Regina, 1979).
- McHugh, Paul G. *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004).
- McLaren, John P.S., A. R. Buck & Nancy E. Wright, eds. *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005).
- McLaren, John P.S., Robert Menzies & Dorothy E. Chunn, eds. *Regulating Lives: Historical Essays on the State, Society, the Individual, and the Law* (Vancouver: UBC Press, 2002).

- McNeil, Kent. *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon : Native Law Centre, University of Saskatchewan, 2001).
- . *Common Law Aboriginal Title* (New York Oxford University Press, 1989).
- Merrell, James. *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: Norton, 1999).
- Merry, Sally Engle. *Colonizing Hawai'i: The Cultural Power of Law* (Princeton: Princeton University Press, 1999).
- Miller, Bruce Granville. *Oral History on Trial. Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).
- Miller, J. R. *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).
- Monahan, Patrick. *Constitutional Law*, 3d ed (Toronto: Irwin Law, 2006).
- Morin, Michel. *L'usurpation de la souveraineté autochtone : le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Montréal: Boréal, 1997).
- Morton, Arthur S. *A History of the Canadian West to 1870-71: Being a History of Rupert's Land (The Hudson's Bay Company Territory) and of the North-West Territory (Including the Pacific Slope)*, 2d ed, (Toronto: University of Toronto Press, 1973 [1939]).
- Newman, Dwight. *The Duty to Consult. New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2009).
- Peterson, Jacqueline & Jennifer Brown. *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985).
- Petitot, E. *Book of Dene* (Yellowknife, NWT: Government of the Northwest Territories, 1976).
- Podruchny, Carolyn. *Making the Voyageur World: Travelers and Traders in the North American Fur Trade* (Lincoln: University of Nebraska Press, 2006).
- & Laura Peers, eds. *Gathering Places: Aboriginal and Fur Trade Histories* (Vancouver: UBC Press, 2010).

- Purich, Donald. *Our Land: Native Rights in Canada* (Toronto: James Lorimer & Co., 1986).
- Ray, Arthur J. *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974).
- . *Telling it to the Judge. Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011).
- & Don Freeman. *"Give Us Good Measure": An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto: University of Toronto Press, 1978).
- , Jim Miller & Frank J. Tough. *Bounty and Benevolence: A Documentary History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000).
- Reid, J.P. *Patterns of Vengeance: Crosscultural Homicide in the North American Fur Trade* (Pasadena, Calif.: Ninth Judicial Circuit Historical Society, 1999).
- Rich, E.E. *Hudson's Bay Company, 1670-1870*, vol. 1 (1670-1763) (New York: Macmillan, 1960).
- Richter, Daniel K. *Facing East from Indian Country. A Native History of Early America* (Cambridge, Mass: Harvard University Press, 2001).
- Sleeper-Smith, Susan. *Indian Women and French Men: Rethinking Cultural Encounter in the Western Great Lakes* (Amherst: University of Massachusetts Press, 2001).
- . *Rethinking the Fur Trade: Cultures of Exchange in an Atlantic World* (Lincoln, Nebraska: University of Nebraska Press, 2009).
- Surtees, R.J. *Indian Land Surrenders in Ontario 1763-1867* (Ottawa: Indian and Northern Affairs Canada, 1984).
- Talbot, Robert J. *Negotiating the Numbered Treaties. An Intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing Ltd, 2009).
- Treaty 7 Elders and Tribal Council, with W. Hildebrandt, D. First Rider and S. Carter. *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996).

- Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).
- . *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008).
- Van Kirk, Sylvia. "*Many Tender Ties*": *Women in Fur-Trade Society in Western Canada, 1670-1870* (Winnipeg: Watson and Dwyer, 1980).
- Veracini, Lorenzo. *Settler Colonialism: A Theoretical Overview* (Palgrave MacMillan, 2010).
- Warkentin, Germaine & Carolyn Podruchny, eds., *Decentring the Renaissance: Canada and Europe in Multidisciplinary Perspective, 1500-1700* (Toronto: University of Toronto Press, 2001).
- Weaver, John. *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal & Kingston: McGill-Queen's University Press, 2003).
- Webber, Jeremy & Colin Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010).
- Wicken, William C. *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).
- . *The Colonization of Mi'kmaw Memory and History, 1794-1928. The King v Gabriel Sylliboy* (Toronto: University of Toronto Press, 2012).
- White, Richard. *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Regions, 1650 – 1815* (Cambridge: Cambridge University Press, 1991).
- Williams Jr., Robert A. *Linking Arms Together. American Indian Treaty Visions of Law and Peace, 1600-1800* (New York; Oxford: Oxford University Press, 1997).
- Wittgenstein, Ludwig. *Philosophical Investigations*, 2d ed, trans. by G.E.M. Anscombe (Oxford: Blackwell, 1958).
- Woolford, Andrew. *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005).
- Young, Simon. *The Trouble with Tradition. Native Title and Cultural Change* (Sydney: The Federation Press, 2008).

Periodicals & Essays

- Alcantara, Christopher. "To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada" (2007) 38 *Publius. The Journal of Federalism* 343.
- Anderson, Chris, "Moya 'Tipimsook ('The People Who Aren't Their Own Bosses'): Racialization and the Misrecognition of "Métis" in Upper Great Lakes Ethnohistory" (2011) 58 *Ethnohistory* 37.
- Asch, Michael I. "Social Context and the Musical Analysis of Slavey Drum Dance Songs" (1975) 19 *Ethnomusicology* 247.
- Attwood, Bain. "The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society" (2004) 2 *History Compass* 1.
- . "In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History" (2005) 20 *Public Culture* 75.
- Baker, Robert. "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51" (1999) 17 *Law & History Review* 209.
- Bakker, Peter. "Hudson Bay Trader's Cree: A Cree Pidgin?" in John D. Nichols and Arden C. Ogg, eds, *Nikotwâsik iskwâhtêm, pâskihtêpayih! Studies in Honour of H.C. Wolfart* (Winnipeg: Algonquian and Iroquoian Linguistics, 1996) 1.
- Barman, Jean & Mike Evans, "Reflections on Being and Becoming Métis in British Columbia" (Spring 2009) *BC Studies* 59.
- Barsh, Russell & James [Sákéj] Youngblood Henderson, "Marshalling the Rule of Law in Canada: Of Eels and Honour" (1999) 11:1 *Constitutional Forum constitutionnel* 1.
- Bell, Catherine & Karin Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 *Saskatchewan Law Review* 667.
- Bindon, Kathryn M. "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land, 1839-54" in David H. Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981) 43.
- Black-Rogers, Mary. "Varieties of 'Starving': Semantics and Survival in the Subarctic Fur Trade, 1750-1850" (1986) 33 *Ethnohistory* 354.

- Blumenthal, Susanna L. "Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History" (2012) 37 *Law & Social Inquiry* 167.
- Boast, Richard P. "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 *Victoria University Wellington Law Review* 547.
- Bohaker, Heidi. "Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701" (2006) 63 *William and Mary Quarterly* 23.
- Borrows, John. "Ground Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22 *New Zealand Universities Law Review* 188.
- . "(Ab)Originalism and Canada's Constitution" (2012) 258 *Supreme Court Law Review* (2d) 351.
- . "Creating an Indigenous Legal Community" (2005), 50 *McGill Law Journal* 153.
- . "Listening for a Change: The Courts and Oral Tradition" (2001) 39 *Osgoode Hall Law Journal* 2.
- . "Wampum at Niagara: the Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155.
- . "Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 40.
- & Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 *Alberta Law Review* 9.
- Brown, Jennifer. "Partial Truths: A Closer Look at Fur Trade Marriage" in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds, *Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 59.
- . "Ethnohistorians: Strange Bedfellows, Kindred Spirits" (1991) 38 *Ethnohistory* 113.
- . "Rupert's Land, *Nituskeenan*, Our Land: Cree and English Naming and Claiming around the Dirty Sea" in Ted Binnema & Susan Neylan, eds, *New Histories for*

- Old: Changing Perspectives on Canada's Native Pasts* (Vancouver: UBC Press, 2007) 18.
- Browne, Murray. "The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia" in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book Co., 2009) 465.
- Carter, Sarah. "Aboriginal People of Canada and the British Empire" in Phillip Buckner, ed., *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 200.
- Cavanagh, Edward. "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670-1763" (2011) 26 *Canadian Journal of Law & Society* 25.
- . "History, Time and the Indigenist Critique" (2012) 37 *Arena Journal* 16.
- Chakrabarty, Dipesh. "Reconciliation and Its Historiography: Some Preliminary Thoughts" (2001) 7 *UTS Review* 6.
- Christie, Gordon. "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 *Windsor Yearbook of Access to Justice* 17.
- . "Justifying Principles of Treaty Interpretation" (2000-2001) 26 *Queen's Law Journal* 143.
- . "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 195.
- Chute, Janet E. "Ojibwa Leadership during the Fur Trade Era at Sault Ste. Marie" in Susan Sleeper-Smith, Jo-Anne Fiske, and William Wicken, eds, *New Faces of the Fur Trade: Selected Papers of the Seventh North American Fur Trade Conference*, Halifax, Nova Scotia, 1995 (East Lansing: Michigan State University Press, 1998) 153.
- Cook, Peter. "Symbolic and Material Exchange in Intercultural Diplomacy: The French and the Haudenosaunee in the Early Eighteenth Century" in Jo-Anne Fiske, Susan Sleeper-Smith & William Wicken, eds, *New Faces of the Fur Trade. Selected Papers of the Seventh North American Fur Trade Conference*, Halifax, Nova Scotia (East Lansing: Michigan State University, 1995) 75.

- Coyle, Michael. "Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties" (2008) 32 *Manitoba Law Journal* 34.
- Craik, Brian. "The Formation of a Goose Hunting Strategy and the Politics of the Hunting Group" in Jim Freedman and Jerome H. Barkow, eds., *Proceedings of the Second Congress, Canadian Ethnology Society*, vol. 2 (Ottawa: National Museums of Canada, 1975) 450.
- Cruikshank, Julie. "Oral Tradition and Oral History: Reviewing Some Issues" (1999) 3 *Canadian Historical Review* 403.
- de Costa, Ravi. "History, Democracy, and Treaty Negotiations in British Columbia" in Alexandra Harmon, ed, *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 297.
- DePasquale, Paul W. "Refractions of the Colonial Past" in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) xv.
- Deveaux, Monique. "Agonism and Pluralism" (1999) 25 *Philosophy & Social Criticism* 1.
- Dickinson, John A. "Native Sovereignty and French Justice in Early Canada" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds., *Essays in the History of Canadian Law*, vol 5 (Toronto: Osgoode Society for Canadian Legal History, 1994) 17.
- Driscoll, Heather Rollanson. "'A Most Important Chain of Connection': Marriage in the Hudson's Bay Company" in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds, *Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 81.
- Elden, Stuart. "Thinking Territory Historically" (2010) 15 *Geopolitics* 757.
- Ewald, William. "Comparative Jurisprudence (1): What was it Like to Try a Rat?" (1995) 143 *University of Pennsylvania Law Review* 1889.
- . "The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"" (1998) 46 *American Journal of Comparative Law* 701.

- Flaherty, David H. "Writing Canadian Legal History: An Introduction" in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1981) 3.
- Fortune, Joel R. "Construing *Delgamuukw*: Legal Arguments, Historical Arguments, and the Philosophy of History" (1993) 51 *University of Toronto Faculty of Law Review* 80.
- Foster, Hamar. "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia" in J. Phillips, T. Loo & S. Lewthwaite, eds, *Essays in the History of Canadian Law* vol. 5 (Toronto: Osgoode Society for Canadian Legal History, 1994)
- . "Long-Distance Justice: the Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 *American Journal of Legal History* 1.
- . "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 *Manitoba Law Journal* 343.
- . "Conflict Resolution During the Fur Trade in the Canadian North West, 1803-1859" (1993) 51 *The Advocate* 871.
- . "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie River Murders, 1835-1839" (1989) 10 *Criminal Justice History* 23.
- . "Canada: 'Indian Administration' from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights" in Paul Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999) 351.
- . "Law and Necessity in Western Rupert's Land and Beyond, 1670-1870" in Louis A Knafla & Jonathan Swainger, eds, *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005) 57.
- . & Alan Grove "'Trespassers on the Soil': United States v. Tom and A New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia" (2003) Summer:138/139 *BC Studies* 51.
- Foster, John E. "Indian-White Relations in the Prairie West during the Fur Trade Period - A Compact?" in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: University of Alberta Press, 1999 [1979]) 181.

- . "The Indian-Trader in the Hudson Bay Fur Trade Tradition" in Jim Freedman and Jerome H. Barkow, eds, *Proceedings of the Second Congress, Canadian Ethnology Society, vol. 1, Mercury Series, Ethnology Service Paper 28* (Ottawa: National Museum of Man, 1975) 571.
- Friesen, Jean. "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1861-76" (1986) series 5, vol 1 Transactions of the Royal Society of Canada 41.
- Gavigan, Shelley. "Prisoner Never Gave Me anything for What He Done": Aboriginal Voices in the Criminal Court" (2007) 3 Socio-Legal Review 71.
- Grabowski, Jan & Nicole St-Onge. "Montreal Iroquois engagés in the Western Fur Trade, 1800-1821" in T. Binnema, G.J. Ens and R.C. Macleod, eds, *From Rupert's Land to Canada* (Edmonton: University of Alberta Press, 2001) 23.
- Harmon, Alexandra. "Introduction. Pacific Northwest Indian Treaties in National and International Historical Perspective" in Alexandra Harmon, ed., *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 3.
- Harring, Sidney L. "'There Seemed to Be No Recognized Law': Canadian Law and the Prairie First Nations" in Louis A. Knafla & Jonathan Swainger, eds., *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005) 92.
- Harris, Douglas C, "Historians and Courts: *R. v. Marshall* and *Mi'kmaq* Treaties on Trial" (2003) 18 Canadian Journal of Law & Society 123.
- Hartog, Hendrik. "Introduction to Symposium on 'Critical Legal Histories': Robert W. Gordon. 1984. Critical Legal Histories. *Stanford Law Review* 36: 57-125" (2012) 37 Law & Social Inquiry 147.
- Henderson, James [Sákéj] Youngblood. "Empowering Treaty Federalism" (1994) 58 Saskatchewan Law Rev 329.
- . "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72 Saskatchewan Law Review 29.
- Hickford, Mark. "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837-53" (2010) 38 The Journal of Imperial and Commonwealth History 175.

- Hunter, Claire. "New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts" (2004) 62 *University of Toronto Faculty Law Review* 61.
- Hunter, Justine. "Treaty commissioner suggests shutdown," *The Globe and Mail*, 13 Oct 2011, p. S1.
- Imai, Shin. "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 *Queen's Law Journal* 1.
- Ingold, Tim. "On the Social Relations of the Hunter-Gatherer Band" in R.B. Lee and R. Daly, eds, *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) 399.
- Irwin, Robert. "Treaty 8: An anomaly revisited" (2000) 127 *BC Studies* 83.
- Iverson, Duncan. "Consent or Contestation" in Jeremy Webber & Colin M Macleod, eds., *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 188.
- Jai, Julie. "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2009) 26 *National Journal of Constitutional Law* 25.
- Johnson, Miranda. "Honest Acts and Dangerous Supplements: Indigenous Oral History and Historical Practice in Settler Societies" (2005) 8 *Postcolonial Studies* 261.
- Johnston, Darlene. "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *University of Toronto Faculty of Law Review* 1.
- Kennedy, Dawnis [Minnawaanagogiiizhigook]. "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77.
- Kleinhans, Martha-Marie & Roderick A Macdonald. "What is a Critical Legal Pluralism?" (1997) 12 *Canadian Journal of Law & Society* 25.
- Knafla, Louis A. & Susan W. S. Binnie. "Beyond the State: Law and Legal Pluralism in the Making of Modern Societies" in Louis A. Knafla & Susan W. S. Binnie, eds., *Law, Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) 3.

- . "Introduction" in Louis A Knafla & Jonathan Swainger, eds, *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: UBC Press, 2005)1.
- Krech III, Sheppard. "On the Aboriginal Population of the Kutchin" (1978) 15 *Arctic Anthropology* 89.
- . "The Death of Barbue, a Kutchin Trading Chief" (1982) 35 *Arctic* 429.
- . "On the Aboriginal Population of the Kutchin" (1978) 15 *Arctic Anthropology* 89.
- Krech III, Sheppard. "Retelling the Death of Barbue, a Gwich'in Leader" in J. Brown and E. Vibert, eds, *Reading Beyond Words: Contexts for Native History*, 2d ed (Peterborough, Ont.; Orchard Park, NY: Broadview Press, 1982) 182.
- Krygier, Martin. "Law as Tradition" (1986) 5 *Law and Philosophy* 237.
- Ladner, Keira. "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2d ed (Peterborough, Ont: Broadview Press, 2003) 181.
- Leclair, Jean. "Federal Constitutionalism and Aboriginal Difference" (2005-2006) 31 *Queen's Law Journal* 521.
- Mack, Johnny. "*Hoquotist*: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson, and Jeremy Webber, eds, *Storied Communities. Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2010) 287.
- McEvoy, John. "Treaty Rights and a Treaty Table" (2006) 55 *University of New Brunswick Law Journal* 105.
- McHugh, Paul G. "The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History and the Tribes" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012) 164.
- . "Sovereignty This Century – Maori and the Common Law Constitution" (2000) 31 *Victoria University of Wellington Law Journal* 187.
- McLaren, John P.S. "Reflections on the Rule of Law: The Georgian Colonies of New South Wales and Upper Canada, 1788-1837" in Diane Kirkby and Catharine Coleborne, eds, *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001) 46.

- McNeil, Kent. "Reconciliation and Third-Party Interests: Tsilhqot'in Nation v British Columbia" (2010) 8 Indigenous Law Journal 7.
- & David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?" (2007) 37 Supreme Court Law Review (2d) 177.
- . "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001) 33 Ottawa Law Review 301.
- . "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) Spring/Summer:37 Manitoba History 2.
- . "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest" in Alexandra Harmon, ed, *The Power of Promises. Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35.
- Merry, Sally Engle. "Anthropology, Law, and Transnational Processes" (1992) 21 Annual Review of Anthropology 357.
- Meyer, David. "Waterfowl in Cree Ritual – The Goose Dance" in Jim Freedman and Jerome H. Barkow, eds., *Proceedings of the Second Congress, Canadian Ethnology Society*, vol. 2 (Ottawa: National Museums of Canada, 1975) 433.
- Miller, J. R. "History, The Courts and Treaty Policy: Lesson from *Marshall* and *Nisga'a*" in Dan Beavon, Jerry P. White & Paul Maxim, eds., *Aboriginal Policy Research: Setting the Agenda for Change* (Ottawa: Thompson Educational Publishing Inc., 2004) 29.
- . "Compact, Contract, Covenant: The Evolution of Indian Treaty Making" in Ted Binnema and Susan Neylan, eds, *New Histories for Old: Changing Perspectives on Canada's Native Pasts* (Vancouver: UBC Press, 2007) 66.
- Monture, Patricia. "Now That the Door is Open: First Nations and the Law School Experience" (1990) 15 Queen's Law Journal 179.
- Morantz, Toby. "Northern Algonquian Concepts of Status and Leadership Reviewed: A Case Study of the Eighteenth-Century Trading Captain System" (1982) 19 Canadian Review of Sociology and Anthropology 482.
- . "Old Texts, Old Questions: Another Look at the Issue of Continuity and the Early Fur-Trade Period" (1992) 58 Cdn. Historical Rev. 166.

- Nadasdy, P. "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations", (2002) 104 *American Anthropologist* 247.
- Napoleon, Val. "Extinction by Number: Colonialism Made Easy" (2001) 16 *CJLS* 113.
- . "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20 *Canadian Journal of Law & Society* 123.
- . "Aboriginal Discourse: Gender, Identity and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 223.
- . "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in J. Webber & C. M. Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45.
- . "Thinking about Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, (2013) 17 *Ius Gentium: Comparative Perspective on Law and Justice* 229.
- Narvey, Kenneth M. "The Royal Proclamation of 7 October 1763: The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 *Saskatchewan Law Review* 123.
- Newman, Dwight G. "Reconciliation. Legal Conception(s) and Faces of Justice" in John D. Whyte, ed., *Moving Toward Justice. Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing Ltd & Saskatchewan Institute of Public Policy, 2008) 80.
- . "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title " (2006-2007) 44 *Alberta Law Review* 779.
- Oman, Nathan. "Unity and Pluralism in Contract Law" (2005) 103 *Michigan Law Review* 1506.
- Normey, Robert. "Angling For "Common Intention": Treaty Interpretation in *R. v. Marshall*" (2000) 63 *Saskatchewan Law Review* 645.
- Patterson, Stephen E. "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 *University of New Brunswick Law J* 41.

- Payne, Michael. "Fur Trade Historiography" in Theodore Binnema, Gerhard J. Ens, and R.C. Macleod, eds, *From Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 3.
- Postema, Gerald J. "On the Moral Presence of Our Past" (1990-91) 36 McGill Law Journal 153.
- Pothier, Dianne. Book Review of *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism* by Alex M. Cameron (2010) 33 Dalhousie Law Journal 189.
- Promislow, Janna. "'Though Wilt Not Die of Hunger...for I Bring The Merchandise': Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-17163" in J. Webber and C. M. Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 77.
- . "One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert's Land and the North-West Territories" in H. Foster, B.L. Berger, and A. R. Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 55.
- . "'It would only be just': A Study of Territoriality and Trading Posts Along the Mackenzie River, 1800-1827" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (London & New York: Routledge, 2012) 35.
- Ray, Arthur J. "Periodic Shortages, Native Welfare and the Hudson's Bay Company, 1670-1930" in Shepard Krech III, ed, *Subarctic Fur Trade: Native Social and Economic Adaptations* (Vancouver: UBC Press, 1984) 1.
- . "Native History on Trial: Confessions of an Expert Witness" (2003) 84 Canadian Historical Review 253.
- . "The Factor and the Trading Captain in the Hudson's Bay Company Fur Trade before 1763" in Jim Freedman and Jerome H. Barkow, eds, *Proceedings of the Second Congress, Canadian Ethnology Society, vol. 1, Mercury Series, Ethnology Service Paper 28* (Ottawa: National Museum of Man, 1975) 586.
- Reilly, Alex & Ann Genovese. "Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence" (2004) 3 Indigenous Law Journal 19.

- Rich, E.E. "Trade Habits and Economic Motivation among the Indians of North America" (1960) 26 *Canadian Journal of Economics and Political Science* 35.
- Richter, Daniel K. "Whose Indian History?" (1993) 50 *William and Mary Quarterly* 379.
- Roness, Lori Ann & Kent McNeil "Legalizing Oral History: Proving Aboriginal Title in Canadian Courts" (2000) 39 *Journal of the West* 6.
- Rotman, Leonard I. "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 *Alberta Law Review* 149.
- . "Marshalling Principles From The Marshall Morass" (2000) 23 *Dalhousie Law Journal* 5.
- Rotstein, Abraham. "Trade and Politics: An Institutional Approach" (1972) 3 *Western Canadian Journal of Anthropology* 1.
- Roughan, Nicole. "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 *University of Toronto Law Journal* 135.
- Russell, Dale. "The Effects of the Spring Goose Hunt on the Crees in the Vicinity of York Factory and Churchill River in the 1700s" in Jim Freedman and Jerome H. Barkow, eds, *Proceedings of the Second Congress, Canadian Ethnology Society*, vol. 2 (Ottawa: National Museums of Canada, 1975) 423.
- Saul, John Ralston. "The Roots of Canadian Law in Canada" (2009) 54 *McGill Law Journal* 671.
- Schaap, Andrew. "Agonism in Divided Societies" (2006) 32 *Philosophy & Social Criticism* 255.
- . "Political Theory and The Agony of Politics" (2007) 5 *Pol Studies Rev* 56.
- Seed, Patricia. "Three Treaty Nations Compared: Economic and Political Consequences for Indigenous Peoples in Canada, the United States, and New Zealand" in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) 17.
- Sharp, Andrew. "History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa" in Michael Peters, ed, *Cultural Politics and the University in Aotearoa/New Zealand* (Palmerston North: Dunmore Press, 1997) 159.

- Sharrock, Susan R. "Crees, Cree-Assiniboines, and Assiniboines: Interethnic Social Organization on the Far Northern Plains" (1974) 21 *Ethnohistory* 95.
- Simpson, Brian. "The Common Law and Legal Theory" in *Legal Theory and Legal History: Essays on the Common Law* (London: The Hambledon Press, 1987) 359.
- Slattery, Brian. "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can Bar Review* 196.
- . "The Generative Structure of Aboriginal Rights" (2007) 38 *Sup Court Law Review* 595.
- . "The Metamorphosis of Aboriginal Title" (2007) 85 *Canadian Bar Review* 255.
- . "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 *Osgoode Hall Law Journal* 101.
- . "Paper Empires: The Legal Dimensions of French and English Ventures in North American" in John McLaren, A.R. Buck, & Nancy E. Wright, eds, *Despotic Dominions: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50.
- Sleeper-Smith, Susan. "The Middle Ground Revisited: Introduction" (2006) 63 *William and Mary Quarterly* 1.
- Sloan, W.A. "The Native Response to the Extention of European Traders into the Athabasca and Mackenzie Basin, 1770-1814" (1979) 3 *Canadian Historical Review* 281.
- Slobodin, Richard. "Band Organization of the Peel River Kutchin", *Bulletin No. 179* (Ottawa: National Museum of Canada, 1962).
- Slowey, Gabrielle A. "Unfinished Business: Self-government and the James Bay Northern Quebec Agreement Thirty Years Later" in Yale D Belanger, ed., *Aboriginal Self-Government in Canada. Current Trends and Issues* (Saskatoon: Purich Publishing Ltd., 2008) 206.
- Smandych, Russell & Rick Linden. "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 *Canadian Journal of Law & Society* 21.
- Sprague, D. N. "Canada's Treaties With Aboriginal Peoples" (1995) 23 *Manitoba Law Journal* 341.

- Spiegel, Gabrielle M. "Memory and History: Liturgical Time and Historical Time" (2002) 41 *History and Theory* 149.
- Stanley, George F.G. "The Indian Background of Canadian History" (1952) 31 *Report of the Annual Meeting of the Canadian Historical Association* 14.
- Stevenson, Mark L. "Visions of Certainty: Challenging Assumptions", *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) 113.
- Stone, Lawrence. "History and Post-modernism, III" (1992) 135 *Past and Present* 189.
- Surtees, Robert J. "Canadian Indian Treaties" in William C. Sturtevant, ed., *Handbook of North American Indians*, vol 4 (Washington: Smithsonian Institution, 1978) 202.
- Tate, John. "Tamihana Korokai and Native Title: Healing the Imperial Breach" (2005) 13 *Waikato L Rev* 108.
- Taylor, John Leonard. "Canada's Northwest Indian Policy in the 1870s: Traditional Premises and Necessary Innovations" in Richard Price, ed, *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987[1979]) 3.
- Teillet, Jean. "A Tale of Two Agreements: Implementing Section 52(1) Remedies for the Violation of Métis Harvesting Rights" in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009) 333.
- Thomson, Duane & Marianne Ignace. "They Made Themselves Our Guests": Power Relationships in the Interior Plateau Region of the Cordillera in the Fur Trade" (2005) Summer:146 *BC Studies* 3.
- Tough, Frank. "The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (2004) 41 *Alberta Law Review* 999.
- Tzimas, Ria. "To What End Dialogue?" (2011) 54 *SCLR* (2d) 494.
- Tully, James. "Consent, Hegemony, and Dissent in Treaty Negotiations" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233.
- Van Kirk, Sylvia. "'The Custom of the Country': An Examination of Fur Trade Marriage Practices" in Lewis H. Thomas, ed, *Essays on Western History* (Edmonton: University of Alberta Press, 1976) 47.

- Venne, Sharon. "Treaties Made in Good Faith" in Paul W. DePasquale, ed., *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press and Canadian Review of Comparative Literature/Revue Canadienne de littérature comparée, 2007) 1.
- Waldron, Jeremy. "The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus" (2006) 11 *Otago Law Review* 161.
- . "Indigeneity: First Peoples and Last Occupancy" (2003) 1 *New Zealand Journal of Public and International Law* 55.
- . "Redressing Historic Injustice" (2002) 52 *University of Toronto Law Journal* 134.
- Walters, Mark D. "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 *Dalhousie Law Journal* 75.
- . "The Morality of Aboriginal Law" (2006) 31 *Queen's LJ* 470.
- . "Histories of Colonialism, Legality, and Aboriginality" (2007) 57 *University of Toronto Law Journal* 819.
- . "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 *McGill Law Journal* 711.
- . "*Mohegan Indians v Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 *Osgoode Hall Law Journal* 785.
- . "Promise and Paradox: The Emergence of Indigenous Rights in Canada" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous People and the Law. Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) 21.
- . "'Your Sovereign and Our Father.' The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought* (New York: Palgrave MacMillan, 2010) 91.
- Ward, Damen. "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australia" (2003) 1 *History Compass* 1.

- Warkentin, Germaine. "Discovering Radisson: A Renaissance Adventurer between Two Worlds" in Jennifer Brown & Elizabeth Vibert, eds, *Reading beyond Words: Contexts for Native History* (Peterborough, ON: Broadview Press, 1996) 43.
- Webber, Jeremy. "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167.
- . "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall LJ 623.
- . "The Meanings of Consent" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3.
- White, Bruce M. "The Woman Who Married a Beaver: Trade Patterns and Gender Roles in Ojibwa Fur Trade" (1999) 46 Ethnohistory 109.
- . "'Give Us a Little Milk': The Social and Cultural Meaning of Gift Giving in the Lake Superior Fur Trade" (1982) 48 Minnesota History 60.
- White, Richard. "Creative Misunderstandings and New Understandings" (2006) 63 William and Mary Quarterly 9.
- . "Using the Past: History and Native American Studies" in Russell Thornton, ed, *Studying Native America: Problems and Prospects* (Madison: University of Wisconsin Press, 1998) 217.
- Wilkins, Kerry. "Unseating Horseman: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*" (2007) 12 Review of Constitutional Studies/Revue d'études constitutionnelles 135.
- . "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alberta Law Review 458.
- Woolford, Andrew. "Transition and Transposition: Genocide, Land and the British Columbia Treaty Process" (2011) 4 Journal of Marxism and Interdisciplinary Inquiry 67.
- Wright, Barry. "Towards a New Canadian Legal History" (1984) 22 Osgoode Hall Law Journal 349.
- Yirush, Craig Bryan. "Claiming the New World: Empire, Law and Indigenous Rights in the Mohegan Case, 1704-1743" (2011) 29 Law and History Review 333.

Government, Commission, and Inquiry Reports

Borrows, John. *Indigenous Legal Traditions in Canada*, Report for the Law Commission of Canada, January 2006.

Brown, George & Ron Maguire. *Indian Treaties in Historical Perspective*, prepared for the Research Branch, Corporate Policy, Indian and Northern Affairs Canada (Ottawa: Indian and Northern Affairs Canada, 1979).

Linden, Honourable Justice Sidney B., Commissioner, *Report of the Ipperwash Inquiry*, (Toronto: Ipperwash Inquiry, 2007).

Lornie, James M. *Final Report with Recommendations regarding the Possibility of Accelerating Negotiations with Common Table First Nations that Are in the BC Treaty Process, and Any Steps Required*, submitted to the Minister of Aboriginal Affairs and Northern Development, 30 November 2011.

Madill, Denis. *B.C. Indian Treaties in Historical Perspective*, prepared for the Research Branch, Corporate Policy, Indian and Northern Affairs Canada (Ottawa: Indian and Northern Affairs Canada, 1981).

Martinez, Special Rapporteur Miguel Alfonso. *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* (UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999).

Morrison, James. *Treaty Research Report – Treaty No. 9*, prepared for the Treaties and Historical Research Centre, Indian and Northern Affairs Canada (Ottawa: Indian and Northern Affairs Canada, 1986).

Office of the Treaty Commissioner of Saskatchewan, “Statement of Treaty Issues: Treaties as a Bridge to the Future”, Office of the Treaty Commissioner, October, 1998.

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996).

Theses, Dissertations, and Unpublished Papers

- Baker, Robert. *Law Transplanted, Justice Invented: Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670-1870* (Master's Thesis, University of Manitoba, 1996) [unpublished].
- Friedland, Hadley. *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM thesis, University of Alberta Faculty of Law, 2009) [unpublished].
- Gavigan, Shelley. *Criminal law on the Aboriginal plains: The First Nations and the first criminal court in the North-West Territories, 1870-1903* (SJD Thesis, University of Toronto Faculty of Law, 2008) [unpublished].
- Johnson, Miranda. *Struggling Over the Past: Decolonization and the Problem of History in Settler Societies* (PhD Thesis, University of Chicago, Department of History, 2008) [unpublished].
- Johnston, Darlene. *Litigating Identity: The Challenge of Aboriginality* (LL.M. Thesis, University of Toronto Faculty of Law, Toronto, 2003) [unpublished].
- Lester, Geoffrey S. *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D.Jur. Thesis, Osgoode Hall Law School, York University, 1981) [unpublished].
- Napoleon, Val. *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria Faculty of Law, 2009) [unpublished].
- Nigol, Paul C. *Discipline, Discretion and Control: The Private Justice System of the Hudson's Bay Company in Rupert's Land, 1670-1770* (PhD Thesis, University of Calgary, 2001) [unpublished].
- McNeil, Kent. "The Meaning of Sovereignty", draft chapter (on file with author).
- Promislow, Janna. *Looking for Law at York Factory* (LLM Thesis, York University, Faculty of Law, 2004) [unpublished].
- Slattery, Brian. *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories* (D. Phil. Thesis, Oxford University, 1979) [unpublished].
- Williams, Paul. *The Chain* (LLM Thesis, Osgoode Hall Law School, York University Law, 1982) [unpublished].

Websites

Johnson, Alice M. "Geyer, George" in English, John, & Réal Bélanger, eds, *Dictionary of Canadian Biography Online*, vol. 1, *sub verbo* online: Library and Archives Canada <<http://www.biographi.ca/>>.

Brown, Jennifer. "Isham, Charles Thomas," in English, John, & Réal Bélanger, eds, *Dictionary of Canadian Biography Online*, online: Dictionary of Canadian Biography Online <<http://www.biographi.ca/indexe.html>>.

Friesen, Jean. "Morris, Alexander" in English, John, & Réal Bélanger, eds, *Dictionary of Canadian Biography Online*, vol. 11, online: Library and Archives Canada <<http://www.biographi.ca/>>.

Rich, E.E. "Isham, James," in English, John, & Réal Bélanger, eds, *Dictionary of Canadian Biography Online*, online: Dictionary of Canadian Biography Online <<http://www.biographi.ca/indexe.html>>.

Sahtu Heritage Sites and Places Joint Working Group. *Rakekée Gok'é Godi: Places We Take Care Of, Report of the Sahtu Heritage Places and Sites Joint Working Group*, 2000, available online: <http://pwnhc.learnnet.nt.ca/research/sahtu_report/index.asp >.

Wiebe, Rudy. "Mistahimaskwa (Big Bear)" in English, John, & Réal Bélanger, eds, *Dictionary of Canadian Biography Online*, vol. 11, online: Library and Archives Canada <<http://www.biographi.ca/>>.

Appendix A: Archival Research

The archival research conducted for this dissertation focussed on two main geographies and time periods: York Factory, from 1670-1763 and the Mackenzie District, from 1800-1827. My intention was to do enough archival work to consider if and how practices established in the early York Factory period transferred with the traders and the Company as it moved inland, west and north.

I drew on research completed for my LLM Thesis. For that project, I reviewed York Factory trading post journals in approximately five year periods, alternating five years on, five years off and adjusting the length of that review period to follow ongoing events or particularly helpful record keepers (such as Isham). The intention was to observe regular patterns of interaction.

For the dissertation, I reviewed additional correspondence records and sources regarding the early period and added materials from the Athabasca and Mackenzie Districts, in the first quarter of the 1800s. In addition, I reviewed some correspondence files in the government records for Treaty 11 from the RG10 series. I also relied on published archival material, particularly traders' journals and letters. Lloyd Keith's published documents from the North West Company was particularly important to this research.

